EDITOR'S NOTE

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No. 86-637-CFX
Status: GRANTED

Title: Communications Workers of America and Its Locals 2100, 2101, 2108 and 2110, Petitioners
v.
Harry E. Beck, Jr., et al.

Docketed:
October 17, 1986

Court: United States Court of Appeals for the Fourth Circuit

See also:
86-1055

Counsel for petitioner: Gold,Laurence

Counsel for respondent: Vieira Jr.,Edwin

Entry	Date	Note	Proceedings and Orders
1	Oct 17 1986	G	Petition for writ of certiorari filed.
2	Oct 17 1986		Appendix of petitioner Communications Wkrs. of Am. filed.
3	Nov 17 1986		Brief of respondents Harry Beck, et al. in opposition filed.
4	Nov 19 1986		DISTRIBUTED. December 5, 1986
5	Dec 8 1986	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
6	Apr 22 1987		Application of the Solicitor General for leave to file a brief as amicus curiae in excess of the page limits
7	Apr 22 1987		filed (A-775), and order granting same by Rehnquist, C.J., on 4/23/87. The brief may not exceed 30 pages.
8	Apr 30 1987		Brief amicus curiae of United States filed.
9	May 6 1987		REDISTRIBUTED. May 21, 1987
10	May 6 1987		REDISTRIBUTED. May 21, 1987
12	May 26 1987		REDISTRIBUTED. May 28, 1987
13	May 26 1987		REDISTRIBUTED. May 28, 1987
14	Jun 1 1987		Petition GRANTED. In addition to the questions presented by the petition, the parties are directed to brief and argue the applicability of San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).
			**********
16	Jul 13 1987		Order extending time to file brief of petitioner on the merits until August 6, 1987.
17	Jul 30 1987		Order further extending time to file brief of petitioner on the merits until August 13, 1987.
19	Aug 12 1987		Order extending time to file brief of petitioner on the merits until August 14, 1987.
20	Aug 14 1987		Joint appendix filed.
21	Aug 14 1987		Brief amicus curiae of AFL-CIO filed.
22	Aug 14 1987		Brief of petitioner Communications Wkrs. of Am. filed.
24	Aug 26 1987		Order extending time to file brief of respondent on the merits until September 30, 1987.
25	Sep 14 1987		Record filed.
26	Sep 26 1987		Brief amici curiae of Pacific Legal Foundation, et al. filed.
27	Sep 30 1987		Brief of respondents Harry Beck, et al. filed.
28	Sep 30 1987		Brief amici curiae of Senators Jesse Helms, et al. filed.
29	Sep 30 1987		Brief amicus curiae of Landmark Legal Foundation filed.
30	Nov 20 1987		CIRCULATED.
31	Nov 23 1987		SET FOR ARGUMENT. Monday, January 11, 1988. (1st case).
32	Jan 4 1988	X	Reply brief of petitioners Communications Wkrs. of Am. filed.

No. 86-637-CFX

Entry	Date	Note	Proceedings and Orders
33	Jan 11 1988		ARGUED.

CORRECTED COPY

No. 86-637

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMUNICATIONS WORKERS OF AMERICA
and ITS LOCALS 2100, 2101, 2108, and 2110,
Petitioners,

v.

HARRY E. BECK, JR., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Section 8(a)(3) of the National Labor Relations Act, as amended ("NLRA"), generally prohibits discrimination on the basis of union membership; by virtue of a proviso to that section, the prohibition does not extend to collective bargaining agreements that contain a "union security" provision which conditions continued employment with the employer on the covered employees' payment to the union that is their duly-selected exclusive bargaining representative of an amount equal to "the periodic dues and the initiation fees uniformly required" of union members. The question presented here is:

Whether an employee of a private-sector employer in an industry to which the NLRA applies states a good federal cause of action, under either the NLRA or the First Amendment, by the claim that the union acting as the employee's exclusive representative expends money collected pursuant to a union security provision for purposes to which the employee objects? *

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* In addition to the parties listed as petitioners in the caption to this petition, the following entities were listed as appellants-cross-appellees in the court of appeals: CWA Committee on Political Education; Local 2350, CWA; AFL-CIO; AFL-CIO Committee on Political Education; Maryland State AFL-CIO; American Telephone & Telegraph; and C&P Telephone Company of Maryland. (Each of these parties was named as a defendant in the district court, but the case was dismissed or settled as to each of the above-listed parties in the district court, and none is a petitioner here.)

In addition to the individual listed as respondent in the caption to this petition, the following additional individuals were appellees-cross-appellants in the court of appeals and are respondents in this Court: Dorris R. Ambrose; Jacqueline S. Brandon; Mary Anna Cox; Sally B. DiMauro; Rue T. F. Downey; Kathleen A. Heil; John J. Hurley; Harriett Lipschultz; Clay B. Lutz; Barbara McGaughgey; Ronald R. Merkle; Ethel T. Merryman; Doris J. Morrow; Marion F. Northrop; Frances M. Phyllis; Vivian Reedy; Barbara A. Russell; Lois A. Stallings; and Harry B. Swartz, Sr.

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IN THE

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OCTOBER TERM, 1986

No. ———

COMMUNICATIONS WORKERS OF AMERICA
and ITS LOCALS 2100, 2101, 2108, and 2110,
Petitioners,

v.

HARRY E. BECK, JR., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Communications Workers of America, et al., petition this Court to issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review the decision and judgment in *Beck v. Communications Workers*, 4th Cir. No. 83-1955 (September 12, 1986).

OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc*, is not yet reported, and is reprinted in the Appendix to this Petition at 1a-28a. The opinion of the court of appeals' panel that heard the case is reported at 776 F.2d 1187, and is reprinted at App. 29a-106a. The opinion and order of the district court granting partial summary judgment to plaintiffs and referring the case to a special

master for remedial determinations is reported at 468 F.Supp 93 and is reprinted at App. 135a-142a. The first report of the special master is unreported and is reprinted at App. 239a-310a. The opinion of the district court on appeal from that report remanding the case to the special master for further determinations is not officially reported, is unofficially reported at 106 LRRM 2323, and is reprinted at App. 127a-134a. The supplemental opinion of the special master is not reported and is reprinted at App. 160a-238a. The opinion of the district court affirming the special master's determinations is not reported and is reprinted at App. 112a-127a. The opinion of the district court on a motion to reconsider is unreported and is reprinted at App. 110a-112a.

JURISDICTION

The *en banc* opinion and judgment of the court of appeals was entered on September 12, 1986. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reprinted at pp. 1a-3a of this petition.

STATEMENT OF CASE

In accordance with the procedures set forth in § 9 of the National Labor Relations Act, as amended, 29 U.S.C. § 159 ("NLRA" or "the Act"), the Communications Workers of America ("CWA"), petitioner herein, was selected by the employees of the American Telephone and Telegraph Company and various of its subsidiaries ("AT&T"), to be their exclusive bargaining representative. CWA chartered several local unions, co-petitioners herein, to assist CWA in representing the AT&T employees. (CWA and the local petitioners are collectively referred to below as "the Union".)

This action was commenced on June 3, 1976 by twenty individual plaintiffs, respondents herein, who at all times relevant were employed by AT&T and who elected not to become union members. Pursuant to collective bargaining agreements between the Union and AT&T, all persons represented by the Union, including nonmembers, are required, as a condition of employment, to pay to the Union an "agency fee" in an "amount equal to the periodic dues" paid by union members.[1] Plaintiffs' complaint alleges that this "union security" clause deprives plaintiffs of a variety of common law, statutory, and constitutional rights.[2]

On March 16, 1979, the district court, acting *sua sponte*, granted partial summary judgment to plaintiffs. That court concluded that "collect[ing] from the plaintiffs amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment . . . violates the First Amendment rights of the plaintiffs," even though the collection is pursuant to a collec-

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[1] Pursuant to a policy adopted by the CWA in 1974, any member or non-member who objects to the expenditure of his money "for activities or causes primarily political in nature," is entitled to a refund of the portion of his money which is so expended. App. 147a n.5. For a description of a more recent version of the CWA policy *see Robinson v. New Jersey*, 741 F.2d 598, 614 (3d Cir. 1984), *cert. denied*, —— U.S. ——, 53 L.W. 3599 (1985).

[2] Union security clauses are of two general types. "Agency shop" agreements require those employees who are covered to pay an "agency fee" in an amount equal to union dues; "union shop" agreements require the covered employees to become members of the union and pay union dues within a specified period of time after hire. But under the NLRA "membership" has been "whittled down to its financial core," which is to say that "membership, insofar as it has significance for employment rights, may . . . be conditioned only upon payment of fees and dues." *NLRB v. General Motors*, 373 U.S. 734, 742 (1963). Accordingly, "although a union shop denies an employee the option of not formally becoming a union member, under federal law it is the 'practical equivalent' of an agency shop." *Abood v. Detroit Board of Education*, 431 U.S. 209, 217 n.10 (1977).

[Continued]

tive bargaining agreement between two private parties. App. 141a. To support that conclusion the district court cited *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), a case involving a collective agreement between a public employer and a union. *See* App. 140a.

In its partial summary judgment order, the district court ruled that the Union was required "to refund to each plaintiff for every year since January 1, 1976, an amount reflecting that portion of his dues-equivalent agency fees which was spent for purposes other than collective bargaining, contract administration, and grievance adjustment." *Id.* at 142a. The district court referred the case to a special master to determine the amount of the refund.

Following protracted proceedings—which consumed over four years and generated over 4,500 pages of testimony and over 4,000 exhibits, *see id.* at 172a, 249a—the master found, and the district court ruled, that largely because the Union "did not keep [its] books of accounts upon any theory of separation of items" between collective-bargaining expenditures and other expenditures, *id.* at 251a, the Union was unable to prove by "clear and convincing evidence" (the burden of proof the master and district court placed on the Union) that more than 21% of its funds in the years prior to 1981 had been expended on matters germane to collective-bargaining. *See id.* at 120a-23a. The district court therefore ordered the Union to refund 79% of the monies that had been paid by plaintiffs during these years. The district court also ordered the Union to implement a complex system of recordkeeping, accounting and auditing—developed by a battery of public accountants retained by the Union—to determine for each subsequent year the proportion of the Union's revenues that is expended as activities unrelated

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[2] [Continued]

For that reason, in this petition we use the generic term "union security agreement" to refer to agency shop and union shop agreements.

to collective bargaining. *See id.* at 108a. And the district court retained jurisdiction to review each year the Union's calculation of "the non-retainable amount." *Id.* at 109a. (In the three years since this system has been implemented, the Union's improved recordkeeping system has shown that the Union expends between 80% and 85% of its income on matters germane to collective bargaining.)

The Union appealed the district court's judgment to the United States Court of Appeals for the Fourth Circuit, and plaintiffs cross-appealed with respect to certain limitations on the remedy the district court had ordered. On the Union's appeal the parties addressed not only the constitutional issue that the district court had resolved but also a quasi-statutory argument that plaintiffs raised in the appellate court as an alternative basis to support the district court's judgment: that "'to avoid serious doubt of the[] constitutionality'" of § 8(a)(3) of the NLRA, the court of appeals could "find that [the Union] violated the implied terms" of that section by requiring nonmembers, as a condition of employment, to pay, over objection, an agency fee equal to union dues. Pl. Br. in C.A. No. 83-1955 at 33-34. The Union's appeal also challenged the district court's calculation of the amount of the refund awarded to the individual plaintiffs.

On October 24, 1985, a panel to the Fourth Circuit, by a 2-1 vote, affirmed the district court's judgment as to liability, agreeing with "both the statutory and constitutional claims of plaintiffs." App. 72a. The only respect in which the panel majority concluded that the district court had erred was in applying an "improper standard of proof," *id.* at 74a, —the clear and convincing evidence standard—in determining the proportion of the Union's expenditures that were attributable to activities germane to bargaining. The panel majority thus remanded the case for a redetermination of the amount of the refunds owed the plaintiffs, applying the proper evidentiary standard to disputed factual issues, *see id.*

at 79a-80a, but in all other respects the panel majority affirmed the district court's judgment.

The Union thereafter filed a petition for rehearing and a suggestion for rehearing *en banc* which the court of appeals granted. On September 12, 1986, a deeply divided *en banc* court reaffirmed the district court's judgment in relevant part.

In reaching this result, the majority of the *en banc* court was unable to agree upon a rationale, and, indeed, five of the six judges who voted to affirm, chose not to author, or join in, any opinion explicating their views. Instead, the *en banc* court issued a brief, *per curiam* order/decision which tallies the votes of the judges as follows:

On the question whether § 8(a)(3) should be construed to prohibit agreements which condition continued employment on the payment of agency fees equal to union dues, the court of appeals split 5-5 with Judges Russell, Widener, Ervin, Chapman and Wilkinson voting for such a construction, and Judges Winter, Hall, Phillips, Sprouse, and Murnaghan reaching the contrary conclusion. App. 5a-6a.

On the question whether a union security provision, when contained in a collective bargaining agreement between two private parties, constitutes state action so as to implicate the First Amendment, two judges (Russell and Chapman, who had formed the panel majority) so found; five judges (Winter, Hall, Phillips, Sprouse, and Murnaghan) reached the opposite conclusion; and three judges (Widener, Ervin and Wilkinson) declined to reach the issue. *Id.*

Finally, the *per curiam* order/decision of the *en banc* court recites that Judge Murnaghan, "speaking for himself, in a separate concurring opinion filed along with this order and opinion" concludes that requiring nonmembers to pay a dues-equivalent fee "violat[es] . . . the union's statutory duty of fair representation, under *Vaca v. Sipes*, 386 U.S. 171 (1967), but he agree[s] with the

dissenting panel opinion insofar as it would deny [plaintiffs' claims] on either the statutory or the constitutional grounds." App. 5a.[3] The *per curiam* therefore concludes:

> The result is that six Judges of the Court voted to sustain federal jurisdiction over the cause, though in some instances on somewhat varying grounds. [*Id.* at 6a.]

With respect to the remedial issues, the *en banc* court's order/decision states that "[t]here was apparently no difference within the Court . . . that the majority panel opinion's disposition of the allocation issue was properly resolved." *Id.* Accordingly, "the result of the *en banc* consideration is the affirmation by the *en banc* court of federal jurisdiction over the cause and of the majority panel's determination on the allocation issue." *Id.*

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[3] It is not entirely clear whether the other five members of the Fourth Circuit who voted to affirm the district court's judgment embraced Judge Murnaghan's reasoning with respect to the fair-representation issue. (The dissenters—Judges Winter, Hall, Phillips, and Sprouse expressly disagreed with Judge Murnaghan in an opinion authored by Judge Winter.) The panel majority, in its opinion, had concluded that respondents "have stated a good cause of action for a violation of . . . the duty of fair representation," but the panel majority's theory, as Judge Murnighan noted in his concurrence, was that "a breach of the duty of fair representation follows *automatically* from a violation of § 8(a)(3)." App. 7a n.3 (emphasis added). Judge Murnaghan, in contrast, found a fair representation violation even though in his view the union security clause does *not* violate § 8(a)(3). *See* App. 8a-9a. Thus, whereas the panel majority treated the duty of fair-representation as merely providing an additional *remedial* basis for this action, Judge Murnaghan viewed the duty as of independent legal significance here.

The *per curiam* decision of the *en banc* court recites that five judges (including the two judges who formed the panel majority) would find a violation "under § 8(a)(3) and . . . the duty of fair representation," App. 5a, but that decision does not indicate whether those judges viewed the duty as of substantive or remedial significance in this context. The *per curiam* decision does state that Judge Murnaghan, in his concurring opinion, is "speaking for himself," *id.*, and Judge Murnaghan viewed himself "to be out of step with everyone but Johnny," *id.* at 9a. On the other hand, the *per*

REASONS FOR GRANTING THE WRIT

Introduction

Although the court of appeals was unable to agree on a single rationale, that court's holding is unmistakable: union security agreements negotiated by private parties in industries covered by the NLRA are unlawful to the extent such agreements condition continued employment on the payment to the union of an amount equal to union dues by an employee who objects to financing the union's activities outside the area of what the courts determine to be " 'collective bargaining, contract administration and grievance adjustment.' " App. 131a-132a. That holding is in square conflict with the decision of the United States Court of Appeals for the Second Circuit in an identical case, *Price v. Auto Workers*, 795 F.2d 1128 (2d Cir. July 16, 1986), which was issued almost contemporaneously with the *en banc* decision in the instant case, and in which a unanimous panel (Cardamone, Pratt, and Miner, JJ.) denied objecting employees "relief from paying full dues and fees under a union security clause contained in the collective bargaining agreement between their employer [General Dynamics Corporation] and their union [the United Auto Workers]." *Id.* at 1130. *Price* rejects each reason advanced by one or more of the judges in the majority below for overturning such union security agreements.[4]

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curiam decision refers to Judge Murnaghan's reasoning in approving terms. *See id.* at 5a n.2 (stating that while the panel majority relied on the duty of fair representation, it did not offer "the same depth of reasoning and perception as does Judge Murnaghan's concurring opinion").

It is not necessary (and so far as we can see not even possible) to determine how many members of the Fourth Circuit concur with Judge Murnaghan's reasoning. It is enough to note that given his vote, one of the questions necessarily presented here is whether the negotiation or enforcement of a union security clause constitutes a breach of the duty of fair representation. *See* pp. 19-24, *infra*.

[4] The panel of the Fourth Circuit that heard this case below recognized the "similar[ity]" between the instant case and *Price*,

This conflict between the circuits concerns legal issues of great practical importance. The NLRA is the nation's basic labor statute, covering virtually the entire private employment sector. Although § 14(b) of the Act, 29 U.S.C. § 164(b), permits the states to proscribe union security agreements, thirty states, with two-thirds of the United States' population, have elected not to do so.[5] In those states, over ninety percent of collective bargaining agreements in industries to which the NLRA applies contain such provisions,[6] and over 6,000,000 workers in those industries are covered by such agreements.[7] Simply stated, then, at stake here is the legality of thousands of collective bargaining agreements covering millions of workers, and the rights and duties of workers, unions and employers under those agreements.[8]

In order to decide whether private-sector union security agreements in NLRA industries are lawful, three issues, addressed by one or another of the judges below and by the Second Circuit in *Price*, must be resolved: (1) should § 8(a)(3) be read to proscribe such agree-

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which at that time was *sub judice* in the Second Circuit. App. 69a n.28.

[5] AFL-CIO, *Economic Comparisons Between Open Shop States and Free Collective Bargaining States*, p. 1 (Oct., 1986).

[6] Bureau of National Affairs, *Collective Bargaining; Negotiations and Contracts* at 87-3 (1986).

[7] United States Department of Labor, *Characteristics of Major Collective Bargaining Agreements*, January 1, 1980, at 1, 3, 23-24.

[8] In contrast, the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"), covers under 1,000,000 workers, many of whom are not unionized. *See* Bureau of Labor Statistics, *Employment and Earnings* at 186 (Jan. 1986). Nonetheless this Court has issued four decisions on whether, and to what extent, labor unions in the industries covered by that Act may, consistent with § 2, Eleventh of the RLA, 45 U.S.C. § 152, Eleventh, and the First Amendment negotiate and enforce union security agreements. *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956); *Machinists v. Street*, 367 U.S. 740 (1961); *Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Ellis v. Railway Clerks*, 466 U.S. 435 (1984).

ments; (2) does a union breach its fair representation obligation by negotiating and enforcing such an agreement or expending the money of objecting fee-payers under such an agreement; and (3) do such agreements implicate the state and therefore the First Amendment? As we show below: this Court has never had occasion to answer any of these questions; each deeply divided the Fourth Circuit; on each question the answer proffered by those judges who were in the majority below conflicts with the unanimous determination of the Second Circuit in *Price*; and on at least the latter two questions, the answer proffered below conflicts as well with the decision of the United States Court of Appeals for the District of Columbia Circuit in *Kolinske v. Auto Workers*, 712 F.2d 471 (D.C. Cir. 1983).

Thus, from the standpoint of both legal doctrine and the practicalities of the situation, this case merits plenary consideration by this Court.

I. THE NLRA § 8(a)(3) QUESTION

A. NLRA § 8(a)(3) makes it unlawful for an employer to "discriminat[e] in regard to hire or tenure of employment or any term of condition of employment" on the basis, *inter alia*, of union membership. That prohibition is subject to two provisos. The first saves union security agreements from condemnation by providing that

> nothing . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . if such labor organization is the representative of the employees . . .

The second proviso qualifies the first by declaring, in pertinent part, that

> no employer shall justify any discrimination against an employee for nonmembership in a labor organization . . . if he has reasonable grounds for believing

> that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Notwithstanding this statutory language which, on its face, allows for agreements which condition continued employment on the payment of "periodic dues" to support the full range of a union's dues-financed activities, five members of the court below concluded that such an agreement violates § 8(a)(3). Although these five judges did not explicate their views on rehearing *en banc*, we may fairly assume that the judges who reached this conclusion (two of whom sat on the original panel) subscribed to the reasoning of the panel majority which found that this Court's decisions in *Machinists v. Street*, *supra*, 367 U.S. 740, and its progeny interpreting § 2, Eleventh of the RLA controlled the interpretation of § 8(a)(3) of the NLRA as well. The panel majority stated:

> [I]t would be difficult, if not impossible, to find two statutes more identical in language and legislative purpose than section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA. It is inconceivable that two such statutes would be construed differently. For this reason, it seems fair to assume that the construction given one by the Supreme Court would be equally applicable to the other, and we proceed on that basis in construing section 8(a)(3). [*App.* 49a.] [9]

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[9] The panel majority was so taken with its NLRA-RLA analogy that the majority found an implied cause of action under § 8(a)(3), notwithstanding the exclusive primary jurisdiction of the National Labor Relations Board. *See, e.g., San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). The panel majority stated:

> [A]s we have seen, the two statutes are to be construed alike and both give to objecting employees the same rights. If there was jurisdiction under section 1337 over a statutory claim under section 2, Eleventh in *Ellis* . . . by the same token there is jurisdiction over the statutory claim under section 8(a)(3)

B. This Court has never confronted the question whether NLRA § 8(a)(3) is properly equated with RLA § 2, Eleventh in this regard. As Judge Winter reminded in his dissenting panel opinion, with which four other members of the *en banc* court expressly agreed, this Court has cautioned that "'[e]ven rough analogies [between the RLA and the NLRA] must be drawn circumspectly with due regard for the many differences between the statutory schemes.'" *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). And as Judge Winter shows at length, the proposed equation between RLA § 2, Eleventh and NLRA § 8(a)(3) ignores at least two distinctions between the two statutes —distinctions which were critical to the *Street* Court's analysis.

1.(a) This Court has recognized that "*Street* embraced an interpretation of the Railway Labor Act not without its difficulties, precisely to avoid facing the constitutional issues presented by the use of union shop dues for political and ideological purposes unrelated to collective bargaining." *Abood*, 431 U.S. at 232. *See also Ellis*, 466 U.S. at 445-46. Those "constitutional issues" were presented in *Street* because "government action was present." *Abood*, 431 U.S. at 218-19, n.12. And that was true because "[u]nlike § 14(b) of the National Labor Relations Act, 29 U.S.C. § 164(b), the Railway Labor Act preempts any attempts by a State to prohibit a union shop agreement" and to that extent affirmatively protects RLA union security agreements. *Abood*, 431 U.S. at 218-19 n.12. Indeed, several years prior to *Street*, in *Railway Employes' Department v. Hanson*, *supra*, the Court had expressly found that a union security agreement negotiated under the RLA poses "justiciable questions under the First and Fifth Amendments . . . since Congress by the union shop provision of the Railway Labor Act sought

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here. In short, jurisdiction can only be denied in this case if jurisdiction is to be denied in *Ellis*. [App. 63a-64a.]

to strike down inconsistent laws in 17 states." 351 U.S. at 231-32. The *Hanson* Court elaborated:

> As already noted, the 1951 amendment [to the RLA], permitting the negotiation of union shop agreements, expressly allows those agreements notwithstanding any law "of any State." A labor agreement made pursuant to the Railway Labor Act has, therefore, the imprimatur of the federal law upon it and, by force of the Supremacy Clause of Article VI of the Constitution, could not be made illegal nor vitiated by any provision of the laws of the State. [351 U.S. at 232; footnotes and citations omitted.]

(b) As Judge Winter observed in his dissenting panel opinion below, "The basis for finding government action in *Hanson*—the federal imprimatur, or mark of approval on agency shop agreements that the Supreme Court discerned in the preemption of all contrary state law—is lacking in the NLRA." App. 103a.[10] Accordingly, unless there were some *other* basis for finding state action here, the considerations that impelled the *Street* Court to adopt an interpretation of RLA § 2, Eleventh "not without its difficulties" so as to avoid "constitutional questions . . . of the utmost gravity," *Street*, 367 U.S. at 749, would not be implicated in this case, and *Street* would not control the interpretation of NLRA § 8(a)(3).

The panel majority, although resting on the supposed similarities between §2, Eleventh and § 8(a)(3), hypothesized as an alternative basis for decision two grounds for finding the state implicated in a union security agreement between private parties in an NLRA-regulated industry: first, that § 8(a)(3) " 'authorizes an employer and a

---

[10] For other appellate court decisions making the same point on the distinction between the RLA and the NLRA, *see Reid v. UAW*, 443 F.2d 408 (10th Cir. 1971); *Kolinske v. Auto Workers*, 712 F.2d 471 (D.C. Cir. 1983). *But see Seay v. McDonnell-Douglas*, 427 F.2d 996 (9th Cir. 1970) (§ 8(a)(3) and § 2, Eleventh "are for all purposes here, the same"); *Linscott v. Miller Falls Co.*, 440 F.2d 14, 16-17, 19-20 (1st Cir. 1971). *See also* n.14 *infra*.

union to enter into union shop agreements' " and thereby " 'cast[s] the weight of the Federal Government behind the agreements' "; and, second, that the union's authority to negotiate such agreements "is grounded directly on the power given [the union] as a result of its status as bargaining representative." App. 70a.[11] Each of these theories of state action runs directly contrary to governing precedents of this Court.

(i) The only sense in which NLRA § 8(a)(3) "authorizes" union security agreements is that, by virtue of its proviso, such agreements are saved from condemnation by that section's general prohibitory words. *See* pp. 10-11 *supra*. The proposition that the state-action doctrine turns on the technicality of whether a general prohibition is drafted so as not to reach certain private conduct or is drafted so that a proviso leaves the conduct unregulated is, we submit, fundamentally unsound. Rather, as this Court has so recently emphasized, to find state action, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible" and the "party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). "Mere approval or acquiescence in the initiatives of a private party is not sufficient to justify holding the state responsible for those initiatives." *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982). Yet the very most that can be said about NLRA § 8(a)(3)'s treatment of union security agreements is that the law "acquiesces" in such privately-negotiated agreements. As Judge Winter observed:

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[11] The three judges who joined with the two members of the panel, on rehearing *en banc*, to find a § 8(a)(3) violation (Judges Widener, Ervin, and Wilkinson), did not join in the panel majority's finding of state action. It is thus not clear whether these three judges viewed *Street* as controlling and, if so, why.

> Nothing in the NLRA compels the adoption of an agency shop agreement; the Act simply provides that federal law does not "preclude" such an agreement between an employer and its employees' bargaining representative. Nor does the Act preempt contrary state law; it merely permits agency shop agreements where there is no state "right to work" law. As the Senate Report on the original NLRA noted, "the bill does nothing to facilitate closed-shop agreements or to make them illegal in any State where they may be illegal." [App. 99a; dissenting opinion.]

(ii) The alternative theory of state action propounded below—that the state is involved because the NLRA vests unions with the authority to act as exclusive representative—fares no better:

> Monopoly status, which is what the right to be the exclusive bargaining agent gives the union, is by itself insufficient to make a private party's acts state action. This issue was settled in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The Supreme Court there held that government-conferred monopoly power alone was insufficient to establish state action in the context of a due process claim against an electrical utility. The Court refused to find state action in suits against state-created monopolists where "there was insufficient relationship between the challenged actions of the entities involved and their monopoly status." [App. 100a; dissenting opinion.]

Indeed, if a union's status as exclusive representative under the NLRA sufficed to transform the union's actions into state actions, then every act of an exclusive representative—and every provision of a collective bargaining agreement negotiated by such a representative—would be attributable to the state. Yet this Court has squarely rejected that proposition on at least two occasions. *See Steelworkers v. Weber*, 443 U.S. 193, 200 (1979) (affirmative action plan in collective bargaining agreement not subject to Fourteenth Amendment scrutiny

because the agreement "does not involve state action"); *Steelworkers v. Sadlowski*, 457 U.S. 102, 121 n. 16 (1982) (union adoption of rules limiting contributions to candidate for union office "does not involve state action" even though "Congress has endowed labor unions with extraordinary authority").[12]

(c) In sum, there is no substantial basis for imputing a union security agreement, negotiated by private parties in an industry which is covered by the NLRA, to the state, and thus, in contrast to § 2, Eleventh of the RLA, there is no need to seek a construction of § 8(a)(3) of the NLRA which would avoid "constitutional questions . . . of the utmost gravity." Accordingly, *Street* is not a controlling precedent here.

2. There is a second reason why *Street* is not controlling: in Judge Winter's words, "careful comparison of the NLRA and RLA shows that the two provisions differ in terms of language, legislative history and statutory purpose." App. 92a-93a; dissenting opinion.

In *Street*, as Judge Winter noted, the Court placed great stress on the fact that before § 2, Eleventh was amended in 1951, the RLA "embraced a 'policy of complete freedom of choice of employees to join or not to join a union,'" and prohibited any form of union security. App. 93a, *quoting Street*, 367 U.S. at 750. The *Street* Court found that in amending that prohibition in 1951, Congress remained "'concern[ed] over possible impingements on the interests of individual dissenters from union policies,'" and Congress made "'inroads'" on the "'policy of full freedom of choice'" for the "'limited purpose of eliminating the problem created by the "free rider,"'" App. 95a, *quoting Street*, 367 U.S. at 767. The *Street*

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[12] *See also Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950) ("We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become Government agencies or may be regulated as such"); *Black v. Cutter Laboratories*, 351 U.S. 292, 298-99 (1956).

Court concluded that requiring RLA agency-fee payers to support, over objection, political or ideological activities unrelated to collective bargaining went beyond the "limited" inroads made by § 2, Eleventh, and was not authorized by that section.

"[T]he legislative history and purpose of the NLRA and Taft-Hartley Act do not permit the same interpretation of § 8(a)(3)." App. 95a (dissenting opinion):

> First, the NLRA never embraced the 1934 RLA's policy of "complete freedom of choice of employees to join or not to join a union" that "survived in § 2, Eleventh." *Street*, 367 U.S. at 750, 767. Rather, the NLRA's policy has been to leave the question of union shop agreements to state law. . . .
>
> Second, the Taft-Hartley Act's legislative history, unlike the RLA's, is unambiguous on the issue of limiting the use of union shop fees. Congress explicitly considered the problem of unions using compelled fees when it enacted the Taft-Hartley Act in 1947. Its response was to prohibit union spending in the particularly sensitive area of federal elections. It explicitly rejected amendments requiring more thorough-going supervision of union shop fees, however, as unjustifiably intrusive and unmanageable. We should respect this Congressional intent in construing § 8(a)(3). [App. at 95a-96a; dissenting opinion.]

Thus, the fact that it was, in *Street*, "fairly possible" and, indeed, "reasonable," 367 U.S. at 750, to view the RLA as limiting the type of union-security arrangements that are lawful in the rail industry does not mean that a like interpretation of the NLRA is "possible," let alone "reasonable." That question—and thus the proper interpretation of NLRA § 8(a)(3)—is an open one in this Court.

C. Insofar as the decision below holds that NLRA § 8(a)(3), like RLA § 2, Eleventh, prohibits union secu-

rity agreements which condition continued employment on the payment of an agency fee equal to the full amount of union dues, that decision is in square conflict with the Second Circuit's decision in *Price*. The *Price* court expressly recognized that the panel in the instant case "sought to harmonize the construction of these two statutes," and the *Price* court stated, "[w]e respectfully disagree with the *Beck* majority's analysis of this issue." 795 F.2d at 1132. Following the lead of the D.C. Circuit in *Kolinske*—which had concluded that the state-action theory of *Street* " 'has no applicability to the National Labor Relations Act,' " 712 F.2d at 476 [13]—the *Price* court found *Street* not to be controlling because "the RLA's preemption of contrary state law was the heart of the . . . finding of government action" in *Hanson* and *Street* and the NLRA "contains no similar preemption of state law." 795 F.2d at 1332. And just as *Kolinske* held that "the decision to accept an agency shop clause . . . is not a governmental act," 712 F.2d at 480, the *Price* court concluded that there was no other basis for finding state action in a union security agreement between private parties in an NLRA industry because

> in enacting the NLRA, Congress mapped out the background and parameters of possible private action, but required nothing with respect to the particular wrong complained of here. When a private party makes the ultimate choice within a range of options offered by the government, state action generally is not implicated. Since the union security clause was a product of private negotiations [it] was

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[13] The state action issue arose in *Kolinske* because the plaintiff there, an agency-fee payer, claimed that his union's refusal to provide him with strike assistance unless he participated in strike activities deprived plaintiff of his First Amendment rights; to find state action the plaintiff relied on the fact that he was paying dues to the union pursuant to a union security agreement permitted by § 8(a)(3). As explained in text, the D.C. Circuit rejected that state-action claim.

not attributable to the government . . . [795 F.2d at 1133.] [14]

II. THE FAIR REPRESENTATION QUESTION

A. In his concurring opinion on rehearing *en banc*, Judge Murnaghan concluded that a "union must use the fees collected from employees only for purposes within the scope of the [principal]-agen[t] relationship" between employees and their union, App. 17a, and that "absent express authorization of nonmember employees," *id.* at 17a n.10, the "expenditure[s] of agency fees collected from nonmembers for non-collective bargaining purposes violates the duty of fair representation," *id.* at 21a.[15] It is not clear whether any other member of the lower court subscribed to Judge Murnaghan's theory. *See* n.3, *supra*.

---

[14] In a decision which predates this Court's state-action rulings in *Jackson*, *Lugar*, and *Blum*—rulings on which *Kolinske* and *Price* heavily rely—the Tenth Circuit concluded that union security agreements in NLRA industries cannot be imputed to the state, *Reid v. UAW*, *supra* n.10, and the First and Ninth Circuits reached the opposite conclusion, *Linscott v. Miller Falls Co.*, *supra* n.10; *Seay v. McDonnell-Douglas*, *supra* n.10. These three circuits have not had occasion to reconsider their decisions in light of this Court's more recent teachings, and thus it is not altogether clear whether *Linscott*, *Reid* and *Seay* are still good law in their respective circuits. There is no reason to believe, however, that the Tenth Circuit would reconsider its decision in light of the support that decision derives from this Court's recent rulings, and thus we believe the decision below, insofar as it relies on a state-action finding, may fairly be viewed to be in conflict with *Reid*, as well as with *Kolinske* and *Price*. If *Linscott* and *Seay* were still good law in the First and Ninth Circuits, then those courts would be aligned with the court below in disagreeing with the *Price-Kolinske* approach.

[15] Judge Murnaghan deemed it "not necessary now to decide whether the scope of the union's agency function—and hence the extent of its permissible use of employee funds—is the same with respect to union members . . ." App. 17a.

B. In his dissenting opinion on rehearing *en banc*, which three other judges joined, Judge Winter criticized Judge Murnaghan's opinion on two grounds.

First, Judge Winter reasoned that because the duty of fair representation concerns "irrational, unequal, unfair treatment of a member of the bargaining unit," that duty "hardly seems applicable where the union's challenged expenditures were made equally on behalf of all members of the collective bargaining unit, dues paying members and agency-fee paying nonunion members alike," and where there is no "proof that the union acted arbitrarily, discriminatorily, or in bad faith in spending its revenues." App. 24a; dissenting opinion.

Second, Judge Winter concluded that "the duty of fair representation, derived from § 9 of the Act, cannot be transgressed if a union does only what Congress has intentionally refrained from prohibiting it to do," and that "Congress specifically intended not to regulate the expenditure of union dues except in minor respects." App. 24a, 26a; dissenting opinion:

> Congress considered the arguments of those who wished to prohibit all union security agreements, and those who wished to retain all such agreements, including the "closed shop." Senator Taft [the principal sponsor of the Labor-Management Relations Act in which § 8(a)(3) was enacted in its present form] took a middle position, distinguishing between the closed shop and the "union shop." Under his compromise, an employee could work at a unionized facility without acquiring membership, but only as long as he "pa[id] the same dues as other members of the union." 93 Cong. Rec. S. 4400 (daily ed. April 30, 1947), *reprinted in* 2 Legislative History of the Labor-Management Relations Act, 1947, at 1142 (1948). Senator Taft explained that the bill thus prohibited the closed shop and guaranteed that a worker could "get a job without joining the union or asking favors of the union . . ." 2 Legislative History, *supra*, at 1422. Once assured of this right

to work without union membership, however, Senator Taft asserted that "[t]he fact that the employee will have to pay dues to the union seems . . . to be much less important." 2 Legislative History, *supra*, at 1422. *See also id.* at 1010-11, 1096-97, 1403 (remarks of Senator Taft). Thus, the compromise that became law was intended to permit union security agreements requiring nonmembers to tender the same dues to the union that members regularly paid. So far as payments to the union were concerned, members and nonmembers were on a parity and treated alike. [App. at 27a; dissenting opinion.] [16]

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[16] Judge Murnaghan attempted to dismiss the legislative history on which Judge Winter relied in two principal ways.

First, Judge Murnaghan contended that "the legislative history indicates merely that Congress chose not to restrict unions' expenditures of employees' funds through the use of unfair labor practice provisions" but that the legislative history does not "preclude the development of such restrictions by the courts under the principles of the duty of fair representation." App. 19a. As Judge Winter responded, however, "stringent regulation was rejected [by Congress] as a matter of legislative judgment and not because of any thought that regulation was unnecessary because [of] the judicial doctrine of fair representation," and "[i]t is disingenuous to assert that the members of Congress who vigorously debated the union security provision of § 8(a)(3) were aware that regardless of their legislative compromise, the judiciary remained free to imply additional limitations under the duty of fair representation." App. 25a & n.4.

Second, Judge Murnaghan asserted that although "Senator Taft endorsed the union shop . . ., the union shop is not the same as the agency shop," and that the legislative history has "no bearing on agency shops or agency fees." *Id.* at 20a n.14. Judge Winter responded:

> I think it sheer sophistry to assert that Congress decided on a very limited regulation only with respect to dues from union members and not also with respect to agency fees. Agency fees are the equivalent of union dues, and it is inconceivable to me that Congress specifically intended not to regulate the expenditure of union dues except in minor respects but, by mere silence, intended the expenditure of agency fees to be regulated under the judicial doctrine of the duty of fair representation. [*Id.* at 25a-26a.]

C. Insofar as the decision below rests on Judge Murnaghan's fair representation theory, that decision once again is in square conflict with *Price* and *Kolinske*.

In *Price*, the Second Circuit concluded that the "mere negotiation" of a union security clause "does not breach the duty of fair representation" because Congress "authoriz[ed] such clause in . . . § 8(a)(3)" and it "strains logic to suggest that the union breached its duty of fair representation by negotiating into the collective bargaining agreement a statutorily authorized provision." 795 F.2d at 1135. The *Price* court likewise determined that a union "cannot be said to have breached its duty of fair representation because it seeks to enforce the union security clause it has successfully negotiated," as it "would be absurd to suggest that parties to a collective bargaining agreement could negotiate but then could not enforce such a provision." *Id.* Finally, the *Price* court held that expending the fees of nonmembers, along with the dues of members, on activities unrelated to collective bargaining—for example, on "recruitment, insurance plans, strike funds, scholarship funds, union publications, and litigation"—does not breach the fair representation duty as these are "activities regularly engaged in by modern unions" and "it is not arbitrary . . . to fund such activities." *Id.* at 1135-36. That court added:

> Furthermore, there is no claim here that these expenditures were motivated by any discriminatory animus. Appellants do not allege that they are being treated differently from other union members; on the contrary, their contention is that, in this instance, they *should* be treated differently because they disagree with the views of those who joined the union voluntarily rather than under the compulsion of the union security clause. Without some showing of discriminatory animus, however, resolution of internal disagreements on how union funds should be spent does not implicate the duty of fair representation. [*Id.* at 1136; emphasis in the original.]

Judge Murnaghan's reasoning is also inconsistent with the holding of the D.C. Circuit in *Kolinske*. In addition to asserting a First Amendment claim, *see* p. 18, *supra*, the plaintiff there alleged that the union had breached its duty of fair representation by refusing to pay him strike benefits unless he actively participated in the strike. Judge Tamm rejected that claim in *Kolinske* on the ground that the manner in which a union decides to expend its funds does not implicate the duty of fair representation:

> Arising as it does out of a union's privilege under section 9(a) of the NLRA to serve as the employee's exclusive representative, the duty of fair representation is co-extensive only with the power of exclusive representation. As we have earlier noted, "a union . . . can be held to represent employees *unfairly* only in regard to those matters as to which it represents them *at all*—namely, 'rates of pay, wages, hours . . ., or other conditions of employment'." In other words, the duty of fair representation extends only to matters involving an employee's dealings with his employer and ordinarily does not affect an employee's relationship with the union structure. [712 F.2d at 481; citations omitted.] [17]

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[17] Judge Murnaghan attempted to reconcile his reasoning with *Kolinske* on the ground that "[t]he union's refusal to pay strike benefits to a nonmember who refused to participate in strike activities was properly characterized as an internal union matter because the authority to make and enforce that decision lay solely with the union," whereas here "the collection of agency fees from employees who are *not* union members can hardly be characterized as a purely internal union matter." App. 16a n.8 (emphasis in original). But the breach of the duty that Judge Murnaghan found in this case related to the union's *use* of the plaintiffs' agency fees and *not* the collection as such: "the union must *use* the fees collected from employees only for purposes within the scope of the agency relationship." *Id.* at 17a (emphasis added). *See also Street*, 367 U.S. at 771 ("appellees' grievance [under the RLA] stems from the *spending* of their funds for purposes not authorized by the Act in the face of their objection, *not from the enforcement of the union-shop*

III. THE STATE ACTION/FIRST AMENDMENT QUESTION

The district court held that conditioning an employee's continued employment on the payment of an agency fee equal to union dues to support the full-range of union dues-funded activities infringes upon the First Amendment rights of employees who object to supporting such activities. The panel majority affirmed the district court in this regard, and the two judges who formed that majority adhered to the view on rehearing *en banc*.

A First Amendment violation, of course, pre-supposes the existence of state action. The question of whether the collective bargaining agreement involved here, which is solely between private parties, is to be imputed to the state is a question of general significance and one whose importance transcends the bounds of labor law. And as we showed in Part I, insofar as the decision below rests on a finding of state action, that decision runs directly contrary to decisions of this Court, and is in square conflict with the Second Circuit's decision in *Price*, and the D.C. Circuit's decision in *Kolinske*. *See also* n.14, *supra*.

* * *

In sum, each of the legal questions that must be faced in order to determine whether NLRA unions may negotiate and enforce union security agreements providing for the payment of an amount equal to union dues is a significant one which merits the Court's attention in its own right. For that reason, and in light of the practical stakes and the confusion and inequity generated by the conflict between the circuits, this case warrants plenary consideration by this Court.

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agreement by the mere collection of funds") (emphasis added). And here, as in *Kolinske*, the Union's decision as to how to expend the money it had collected "lay solely with the Union." Thus, Judge Murnaghan's attempt to distinguish *Kolinske* does not withstand analysis.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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STATUTORY PROVISIONS

STATUTORY PROVISIONS

Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(3) provides as follows:

> It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has rea-

sonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), provides in pertinent part as follows:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive repreesntatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment;

Section 14(b) of the National Labor Relations Act, 29 U.S.C. § 164(b), provides in pertinent part as follows:

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, provides in pertinent part as follows:

> Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or any State, any carrier or carriers as defined in this Act and a labor oganization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the

effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

86-637

No. _____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMUNICATIONS WORKERS OF AMERICA
and ITS LOCALS 2100, 2101, 2108, and 2110,
Petitioners,

v.

HARRY E. BECK, JR., *et al.*,
Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-1955

HARRY E. BECK, JR.; DORIS R. AMBROSE; JACQUELINE S. BRANDON; MARY ANNA COX; SALLY B. DIMAURO; RUE T.F. DOWNEY; KATHLEEN A. HEIL; JOHN J. HURLEY; HARRIETT LIPSCHULTZ; CLAY B. LUTZ; BARBARA MCGAUGHEY; ROLAND R. MERKLE; ETHEL T. MERRYMAN; DORIS J. MORROW; MARION F. NORTHROP; FRANCES M. PHILLIPS; VIVIAN REEDY; BARBARA A. RUSSELL; LOIS A. STALLINGS; HARRY B. SWARTZ, SR.,

Appellees,

versus

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), an unincorporated Labor Organization; C.W.A. COMMITTEE ON POLITICAL EDUCATION (C.W.A. COPE); C.W.A. DISTRICT II; LOCAL 2100 OF C.W.A.; LOCAL 2101 OF C.W.A.; LOCAL 2108 OF C.W.A.; LOCAL 2110 OF C.W.A.,

Appellants,

and

LOCAL 2350 OF C.W.A.; AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), a Federation of National and International Labor Organizations; AFL-CIO COMMITTEE ON POLITICAL EDUCATION; MARYLAND STATE AFL-CIO; AMERICAN TELEPHONE & TELEGRAPH, a Corporation; C & P TELEPHONE COMPANY OF MARYLAND, a Corporation,

Defendants.

No. 83-1956

HARRY E. BECK, JR.; DORIS R. AMBROSE; JACQUELINE S. BRANDON; MARY ANNA COX; SALLY B. DIMAURO; RUE T.F. DOWNEY; KATHLEEN A. HEIL; JOHN J. HURLEY; HARRIETT LIPSCHULTZ; CLAY B. LUTZ; BARBARA MCGAUGHEY; ROLAND R. MERKLE; ETHEL T. MERRYMAN; DORIS J. MORROW; MARION F. NORTHROP; FRANCES M. PHILIPS; VIVIAN REEDY; BARBARA A. RUSSELL; LOIS A. STALLINGS; HARRY B. SWARTZ, SR.,

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versus

COMMUNICATIONS WORKERS OF AMERICA (C.W.A., an unincorporated Labor Organization; C.W.A. COMMITTEE ON POLITICAL EDUCATION (C.W.A. COPE); C.W.A. DISTRICT II; LOCAL 2100 OF C.W.A.; LOCAL 2101 OF C.W.A.; LOCAL 2108 OF C.W.A.; LOCAL 2110 OF C.W.A.,

Appellees,

and

LOCAL 2350 OF C.W.A.; AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), a Federation of National and International Labor Organizations; AFL-CIO COMMITTEE ON POLITICAL EDUCATION; MARYLAND STATE AFL-CIO; AMERICAN TELEPHONE & TELEGRAPH, a Corporation; C & P TELEPHONE COMPANY OF MARYLAND, a Corporation,

Defendants.

Appeals from the United States District Court
for the District of Maryland, at Baltimore
James R. Miller, Jr., District Judge. (C/A M-76-839)

Argued: April 8, 1986. Decided: September 12, 1986

Before WINTER, Chief Judge, and RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN and WILKINSON, Circuit Judges, sitting en banc.

Laurence Gold (James Coppess; George Kaufman on brief) for Appellants/cross-appellees; Edwin Vieira (Joseph J. Hahn, National Right to Work Legal Defense Foundation, Inc., on brief) for Appellees/cross-appellants.

PER CURIAM:

In this cause, the existence of federal jurisdiction constituted the dividing issue both between the majority and dissenting panel opinions, as reported in 776 F.2d 1187 (4th Cir. 1985), as well as in the en banc hearing. Without reviewing the extended discussion of this issue in the two panel opinions, which delineated adequately the difference in the Court on the dispositive issue of jurisdiction, it seems sufficient for purposes of this en banc decision to summarize the ultimate jurisdictional decision as stated in the two panel opinions, beginning first with the majority opinion.

The majority panel opinion found first that the exaction of union dues from non-consenting non-union employees under an agency contract beyond the requirements for purposes of collective bargaining, grievance adjustment or contract administration was "a clear breach of section 8(a)(3) [of the NLRA] and of the union's duty of fair representation." It then concluded that federal jurisdiction "over plaintiffs' statutory suit against defendant union under section 8(a)(3) and for breach of the duty of fair representation was properly invoked under 28 U.S.C. § 1337." 776 F.2d at 1204-05 [1]

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[1] The majority opinion, in note 26 on page 1204, also opined that federal jurisdiction might also be found "under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185."

The majority opinion opined that, having found federal jurisdiction for violation of both the statute and the duty of fair representation, it seemed "unnecessary . . . to consider the constitutional basis for jurisdiction" *id.*, but despite this, it proceeded to state that on constitutional grounds jurisdiction in the cause was sustainable even though it had earlier recognized that decisions on constitutional grounds should be avoided if the matter could be resolved on statutory grounds. *See* 776 F.2d at 1198 and *International Association of Machinists v. Street*, 367 U.S. 740 (1961).

The dissenting panel opinion, on the other hand, concluded that § 8(a)(3) of the NLRA "cannot fairly be read to impose" on unions under an agency shop agreement the obligation to use agency shop fees only "for purposes . . . directly related to collective bargaining, grievance adjustment, or contract administration" as against objecting non-union employees. 776 F.2d at 1214. As the dissent puts its position, "[b]oth the language of § 8(a)(3) and its legislative history show that Congress did not intend to limit the use of agency shop fees under the NLRA. Further, the history and purpose of this provision differs from the history and purpose of the agency shop provision in the Railway Labor Act; thus the Railway Labor Act's limits on fee use should not be engrafted onto the NLRA's § 8(a)(3)." 776 F.2d at 1215. Nor, the opinion continues, can such exaction by the union of these dues to be used for purposes not related to "collective bargaining, grievance adjustment or contract administration" represent a cognizable constitutional claim because the union's "use of [such non-consenting employees'] fees does not constitute state action." 776 F.2d at 1214. The dissenting opinion did not discuss the maintainability of the action as one for a violation of the duty of fair representation by the union under § 1337.

After the filing of the panel opinions, en banc hearing of the cause was voted. At the en banc hearing, the arguments of the parties focused on the existence of federal jurisdiction of the cause. The arguments of the parties on such issues followed substantially the line of the two panel opinions already summarized, with the plaintiffs relying on the jurisdictional grounds adumbrated in the panel majority opinion and with the union and its local resting their argument on the grounds stated in the dissenting opinion.

After the en banc arguments, five members of the Court (Judges Russell, Widener, Ervin, Chapman, and Wilkinson), voted that federal jurisdiction "over plaintiffs' statutory suit against defendant union under section 8(a)(3) and for breach of the duty of fair representation was properly invoked under 28 U.S.C. § 1337," but three of these five judges (Judge Widener, Ervin, and Wilkinson) felt it unnecessary to consider whether jurisdiction also existed on constitutional grounds. Judges Russell and Chapman, the other members of the group, however, were of the opinion that jurisdiction of the cause could also be sustained on the constitutional claim. Judge Murnaghan, speaking for himself, in a separate concurring opinion, filed along with this order and opinion, found that federal jurisdicion existed in this case to decide the plaintiffs' claims as violations of the union's statutory duty of fair representation, under *Vaca v. Sipes*, 386 U.S. 171 (1967),[2] but he agreed with the dissenting panel opinion insofar as it would deny federal jurisdiction on either the statutory or the constitutional grounds. The result is that six Judges of the Court voted to sustain federal jurisdiction over the cause, though in some instances on somewhat varying grounds.

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[2] It is inaccurate to state that the majority opinion did not find jurisdiction on the violation of the duty of fair representation by the union. The majority panel opinion did assert such jurisdiction but it did not assert it with the same depth of reasoning and perception as does Judge Murnaghan's concurring opinion.

Four members of the Court have, however, voted after the en banc hearing, (Judges Winter, Hall, Phillips, and Sprouse) to sustain the conclusions of the dissenting panel opinion that here was no federal jurisdicion herein either on statutory or constitutional grounds. The dissenting opinion did not specifically address the violation of the duty of fair representation, as alleged in the plaintiffs' complaint and as found in both the majority panel opinion and in the concurring opinion of Judge Murnaghan to be a basis for jurisdiction herein, but it is to be assumed that this ground was similarly disapproved in the dissenting opinion.

It follows that the en banc court by a vote of six to four sustained federal jurisdiction in this cause. There was apparently no difference within the Court, assuming that federal jurisdiction was upheld, that the majority panel opinion's disposition of the allocation issue was properly resolved.

Accordingly, the result of the en banc consideration is the affirmation by the en banc court of federal jurisdiction over the cause and of the majority panel's determination on the allocation issue.

MURNAGHAN, Circuit Judge, concurring:

The posture of the case, the order of my writing and the outcome are, if not unique, at least unusual. A two-to-one majority at the panel level held unconstitutional a labor union's practice of using agency fees, received from employees who were not union members, for purposes unrelated to collective bargaining, grievance adjustment, or contract administration. Alternatively, the majority concluded that the union's conduct had violated § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3). The non-member employees were entitled to relief for that violation, in the majority's view,

on two theories: first, that § 8(a)(3) itself provided them with a cause of action justiciable in the federal courts, and, second, that the definition of an unfair labor practice contained in § 8(a)(3) also described a breach of the duty of fair representation.[3] Judge Russell authored the majority opinion, with Judge Chapman concurring. *Beck v. Communications Workers of America*, 776 F.2d 1187 (4th Cir. 1985).

Chief Judge Winter, in dissent, concluded that the absence of government action foreclosed the constitutional route to recovery, and that § 8(a)(3), involving only controversies between employers and employees, created no restriction on a union's authority to use agency fees for non-collective-bargaining purposes. He further concluded that, in the absence of a violation of § 8(a)(3), there could be no breach of the duty of fair representation, and that, in any event, the plaintiffs had no cause of action based on § 8(a)(3) itself, due to the National Labor Relations Board's exclusive jurisdiction to deal

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[3] The extent to which the panel majority relied on the duty of fair representation is unclear. On the one hand, the opinion states that "plaintiffs have stated a good cause of action for a violation of . . . the duty of fair representation" as well as for a violation of § 8(a)(3). 776 F.2d 1187, 1196. Moreover, the majority plainly concluded that it was the fair representation claim that brought the statutory aspect of the case within this court's jurisdiction, rather than within the exclusive jurisdiction of the NLRB. *Id.* at 1203-04. On the other hand, the majority's rationale for its holding on the statutory issue is explained exclusively in terms of § 8(a)(3) and its relationship to § 2, Eleventh of the Railway Labor Act, with no consideration given to the independent force of the duty of fair representation. In addition, the opinion states that "[o]nly if jurisdiction of these claims *under § 8(a)(3) itself* is non-existent would a dismissal of this action . . . be appropriate." *Id.* at 1196 (emphasis supplied). These somewhat contradictory indications are reconciled, it seems to me, if the opinion is read to hold that a breach of the duty of fair representation follows automatically from a violation of § 8(a)(3). If I have misread Judge Russell, I solicit his indulgence.

with unfair labor practices under the doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). *Id.* at 1214-25.

A grant of rehearing *en banc*, of course, eliminated the panel level decisions as grounds for disposing of the case. Back at square one, the court divided six to four. Judge Widener, Judge Ervin and Judge Wilkinson joined Judge Russell and Judge Chapman on one side of the great divide, while Judge Hall, Judge Phillips and Judge Sprouse aligned themselves with Judge Winter.

I find myself in an odd position. On the two issues addressed by my brothers, I find myself in Chief Judge Winter's camp. In my view, governmental authority cannot be ascribed to the union here, and hence there can be no constitutional violation. Nor, I believe, does § 8(a)(3) in itself prohibit unions from spending agency fees for purposes unrelated to collective bargaining, grievance adjustment, or contract administration. Those arguments are fully adequate to rebut the contentions marshalled by Judge Russell. However, another set of considerations, raised by the plaintiffs[4] but not dealt with

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[4] In his dissenting opinion at the *en banc* level, Chief Judge Winter argues that the issue of the duty of fair representation was neither advanced by the parties nor considered by the panel majority. *Post*, at 1. It is true that, in the briefs and oral arguments, the duty of fair representation was overshadowed by the parties' emphasis on § 8(a)(3). However, that seems to have occurred because the parties, like the panel majority, believed that § 8(a)(3) provided a sort of "standard of care" for the duty of fair representation, and not because they believed that the plaintiffs' claim rested on § 8(a)(3) alone. A review of the record reveals the inaccuracy of the suggestion that the fair representation issue is of my own devising.

The duty of fair representation was initially raised as a ground for relief in the plaintiffs' complaint. Supplemental Appendix 15. Moreover, it is noteworthy that, although the issue was raised separately, the complaint also charged that the union's expenditure of agency fees violated its fiduciary duty to all bargaining unit

by Chief Judge Winter or by Judge Russell, has led me to the conclusion that the plaintiffs should prevail. It is one thing to be out of step with everyone but Johnny. It is even more lonely to find my vote the casting one, where that status derives from its alignment with five votes in favor of a rationale I disagree with and its operation to four votes whose rationale, to the extent expressed, I approve.

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employees. *Id.* at 12-15. The plaintiffs' failure, at that stage, to perceive a connection between their claims surely does not prevent this court from doing so.

The question of the duty of fair representation was raised again in the briefs submitted in connection with the initial hearing on appeal before a panel of this court. The defendants pointed out that because claims based directly on § 8(a)(3) are within the exclusive jurisdiction of the National Labor Relations Board, the plaintiffs would have to find an alternative basis for their statutory claim if they wished this court to consider it. Reply Brief of Appellants/Cross-Appellees 9-10. The plaintiffs responded with the argument that the statutory basis for their claim actually lay in the implied duty of fair representation. Appellees' Supplemental Brief 2-3. Although the plaintiffs did not clarify their view of the relationship between the basis of their claim in the duty of fair representation and their arguments under § 8(a)(3), the only reasonable interpretation of their position seems to be that they believed that § 8(a)(3) provided a convenient standard by which the presence or absence of a breach of the duty of fair representation could be tested.

Finally, the panel majority's opinion clearly considered and agreed with the plaintiffs' arguments concerning the fair representation issue. A close reading of that opinion reveals that the panel majority believed that the plaintiffs had two alternative statutory claims, one based directly on § 8(a)(3), the other based on the duty of fair representation. The panel majority concluded that the union's expenditure of agency fees was "not only a violation of the statute itself but also a violation of the duty of fair representation." 776 F.2d at 1203. The majority then explained, in an extensive discussion, that the presence of the fair representation claim provided the court with jurisdiction and defeated the argument that exclusive jurisdiction lay with the NLRB. *Id.* at 1203-04.

I.

The plaintiffs are twenty employees of the American Telephone and Telegraph Company and the Chesapeake & Potomac Telephone Company. Both employers have negotiated collective bargaining agreements with the Communications Workers of America (CWA). Both collective bargaining agreements contain an "agency shop" provision, which requires the employer to deny employment to any employee who refuses either to join the CWA or to pay the CWA agency fees equivalent to union dues. The plaintiffs are employees who are not members of the union, and who have regularly paid the required agency fees. The CWA and its locals use a part of the fees paid by the plaintiffs for purposes unrelated to collective bargaining, contract administration, or grievance adjustment.

The plaintiffs filed the present action in the United States District Court for the District of Maryland in June 1976. The plaintiffs alleged that the CWA had violated both its statutory duty of fair representation and the plaintiffs' First Amendment rights of freedom of expression by executing and enforcing the agency shop provisions in such a manner as to coerce the plaintiffs into paying fees which are not used for collective bargaining purposes. Although the union had adopted an internal procedure for the refund of the appropriate portion of dues and fees to employees who objected to such expenditures, the plaintiffs contended that the procedure was inadequate. The plaintiffs sought a declaratory judgment establishing the illegality of the exaction of fees for non-collective-bargaining purposes, an injunction against the CWA's continued use of agency fees for such purposes, and a monetary judgment for fees collected and used for such purposes in the past.

The CWA moved to dismiss the action because of the plaintiffs' failure to exhaust internal union procedures

for resolving the dispute, or, in the alternative, for a stay pending such exhaustion. The district court denied the motion. *Beck v. Communications Workers of America*, 468 F. Supp. 87, 90-91 (D. Md. 1979). The district court reasoned that deferral to the union's internal rebate procedure was not warranted where the plaintiffs alleged that the procedure itself violated their rights. The CWA does not appeal that decision.

The district court subsequently decided that the plaintiffs were entitled to the relief they sought. Addressing the question of restitution of amounts previously collected and improperly used, the court ruled that if the parties could not agree upon the sums to be refunded, the court would appoint a special master to make that determination. *Beck v. Communications Workers of America*, 468 F. Supp. 93, 97 (D. Md. 1979).

The parties were unable to agree on the amounts to be refunded, and a master was appointed. In his first report, filed August 18, 1980, the master found that only 19% of the CWA's total expenditures were made for purposes related to collective bargaining and contract administration, and he recommended that 81% of past agency fees collected by the CWA be refunded to the plaintiffs. The CWA filed exceptions to the report. The district court remanded the matter to the master, directing the master to make specific findings in response to questions prepared by the court. *Beck v. Communications Workers of America*, 106 LRRM 2323 (D. Md. 1981). The master filed a supplemental report in September 1981 which largely reaffirmed his earlier findings. The CWA filed exceptions to the supplemental report.

On March 5, 1982, while the district court was considering those exceptions, the union filed a motion under Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim. The union contended that the plaintiffs' constitutional claim failed for lack of govern-

ment action, and that the statutory claim failed because the union's conduct did not violate the duty of fair representation.

The district court apparently ignored the union's motion to dismiss, thereby effectively denying the motion. Instead, the district court granted judgment for the plaintiffs for restitution of previously paid agency fees in specified amounts. The district court also permanently enjoined the CWA and its locals from retaining from the plaintiffs in the future the portion of their agency fees certified as non-retainable by an independent certified public accountant.

On appeal, the CWA raised two claims of error. First, it argued that its motion to dismiss the complaint should have been granted. Second, it contended that, if the complaint properly stated a claim, the district court and the special master had applied an erroneous standard of proof in determining the amount of the plaintiffs' refunds. Judge Russell, joined by Judge Chapman, held that the plaintiffs had properly stated a claim for violation of both their constitutional rights and the requirements of § 8(a)(3); they then went on to agree with the union that an enormous standard of proof had been applied. The panel therefore voted to vacate some of the special master's conclusions and to remand the case for further proceedings. *Beck v. Communications Workers of America*, 776 F.2d 1187 (4th Cir. 1985). Chief Judge Winter, in dissent, concluded that the motion to dismiss the complaint should have been granted. *Id.* at 1214-25.

II.

Chief Judge Winter has, in my opinion, the better of the arguments as to whether the Communications Workers of America, in applying agency fees to non-collective-bargaining purposes, has infringed First Amendment rights of the plaintiffs or breached a statutory duty under § 8(a)(3). I simply do not perceive the existence

of governmental action sufficient to invoke the Constitution. Moreover, I agree with Chief Judge Winter that the courts do not have jurisdiction to consider a claim resting directly on § 8(a)(3). Claims based on conduct which arguably amounts to an unfair labor practice under § 8 of the National Labor Relations Act are within the exclusive jurisdiction of the National Labor Relations Board. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). While we may, of course, review the unfair labor practice determinations of the NLRB, § 8(a)(3) provides no right of action that is cognizable in the first instance in the federal courts.[5]

On the other hand, federal courts plainly have jurisdiction to decide claims for violation of a union's statutory duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 176-88, (1967). Because that duty does not arise from the NLRA's unfair labor practice provisions, such claims were originally thought to be outside the scope of the NLRB's jurisdiction. Somewhat belatedly, the NLRB decided that a union's breach of its duty of fair representation also constitutes an unfair labor practice under §§ 8(b)(1) and 8(b)(2). *Miranda Fuel Co.*, 140 NLRB 181 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). Nevertheless, in *Vaca v. Sipes*, *supra*, the Supreme Court explicitly held that the NLRB's assumption of jurisdiction did not deprive the federal courts of jurisdiction, despite the holding in *San Diego Building Trades Council v. Garmon*.[6] Thus, it is settled that

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[5] No siimlar jurisdictional problem exists with respect to the analogous provision of the Railway Labor Act, § 2, Eleventh, relied on by Judge Russell, which also authorizes the adoption of union shop and agency shop agreements. Unlike § 8(a)(3), § 2, Eleventh is not subject to the jurisdiction of an administrative board. Indeed, there is no administrative board under the RLA whose functions parallel those of the NLRB.

[6] The Court explained that:

> [A] primary justification for the pre-emption doctrine [announced in *Garmon*]—the need to avoid conflicting rules of

suits for breach of the duty of fair representation, unlike claims based on § 8(a)(3), are cognizable in federal courts.

Chief Judge Winter assumed, however, that the scope of the duty of fair representation, as it relates to the use of agency fees, is merely coextensive with the requirements of § 8(a)(3). He therefore concluded that, in the absence of a violation of § 8(a)(3), the fair representation issue was also necessarily resolved in favor of the union. It is at this point that I part company with Chief Judge Winter's analysis. The extent of the duty of fair representation is not identical to that of § 8(a)(3). The two statutory obligations are quite distinct. The duty of fair representation does not arise from § 8(a)(2) or from any of the NLRA's unfair labor practice provisions; rather, it is implicit in the statute as a whole. *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967); *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953).[7] Conduct that amounts to an

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> substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving alleged breaches of the union's duty of fair representation. . . . [A]s these matters are not normally within the Board's unfair labor practice jurisdiction, it can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts, ... Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements.

Vaca v. Sipes, 386 U.S. at 180-81, 186.

[7] Insofar as the statutory source of the duty may be more precisely located, it is to be found in § 9(a) of the Act, which grants to recognized unions the privilege of acting as the exclusive bargaining representative of all employees. *Kolinske v. Lubbers*, 712 F.2d 471, 481 (D.C. Cir. 1983); *Local Union No. 12, United Rubber Workers v. N.L.R.B.*, 368 F.2d 12, 17 (5th Cir. 1966); *Price v.*

infringement of § 8(a)(3) may also violate the duty of fair representation, but it does not follow that there can be no fair representation breach in the absence of a § 8(a)(3) violation.

An analysis of the application of the duty of fair representation in the present case must begin with the threshold question whether the duty is implicated at all in the collection and spending of agency fees. A union's duty of fair representation extends only to the union's conduct in representing employees in dealing with their employer. *Kolinske v. Lubbers*, 712 F.2d 471, 481 (D.C. Cir. 1983). The union must abide by that duty, for example, in negotiating a collective bargaining agreement, *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), or in adjusting an employee's grievance, *Bowen v. United States Postal Service*, 459 U.S. 212 (1983); *Vaca v. Sipes*, 386 U.S. 171 (1967). On the other hand, the duty of fair representation does not apply to the union's treatment of employees within its own internal structure. *Bass v. International Brotherhood of Boilermakers*, 630 F.2d 1058, 1062-63 (5th Cir. 1980).

The duty of fair representation, however, extends to a union's collection and use of agency fees. If dissenting employees refuse to pay the portion of their fees that is to be used for non-collective-bargaining purposes, the employer is obligated, under the terms of the agency shop clause of the collective bargaining agreement, to discharge them. The matter thus involves the union's representation of employees in dealing with the employer, thereby implicating the duty of fair representation. In particular, the collection of agency fees from employees who are *not* union members can hardly be characterized as a purely internal union matter, because the union would

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United Auto Workers, 621 F.Supp. 1243, 1250 (D. Conn. 1985). That privilege carries with it the duty to represent all employees fairly. *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 200-04 (1944).

have no power to coerce the payment of fees from such employees absent the threat of action by the employer.[8]

The duty of fair representation imposes on a recognized union an obligation that is fiduciary in nature. *Howard v. Aluminum Workers Int'l Union*, 589 F.2d 771, 774 (4th Cir. 1978); *Thompson v. Brotherhood of Sleeping Car Porters*, 316 F.2d 191, 201 (4th Cir. 1963).[9] The union's exclusive bargaining status, which involves a power to act on behalf of all employees, necessarily creates a relationship of trust. The Supreme Court has explained that the relationship between a union and the employees whom it represents is governed by the "principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf." *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202 (1944). In effect, the union acts as the agent of the employees it represents, union and non-union alike. *Humphrey v. Moore*, 375 U.S. 335, 342 (1964); *Wallace Corp. v. Labor Board*, 323 U.S. 248, 255 (1944). As an agent, the union may not seek to further its own interests at the expense of a principal.

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[8] The issue here is thus very different from that presented in *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983), which held that the duty of fair representation was not implicated in a union's unilateral decision not to distribute strike benefits to non-union employees who honored a picket line but failed to participate in various strike activities. The union's refusal to pay strike benefits to a non-member who refused to participate in strike activities was properly characterized as an internal union matter because the authority to make and enforce that decision lay solely with the union, and did not depend on, and indeed could hardly count on, the cooperation of the employer.

[9] *Accord, N.L.R.B. v. Local 282, Int'l Brotherhood of Teamsters*, 740 F.2d 141, 147 (2d Cir. 1984); *Deboles v. Trans World Airlines*, 552 F.2d 1005, 1014 (3d Cir. 1977); *Waiters Union, Local 781 v. Hotel Ass'n*, 498 F.2d 998, 1000 (D.C. Cir. 1974); *Local Union No. 12, United Rubber Workers v. N.L.R.B.*, 368 F.2d 12, 17 (5th Cir. 1966).

Instead, the union must use the fees collected from employees only for purposes within the scope of the agency relationship.

With respect to employees who are not members of the union, the scope of the union's agency function is defined, not by mutual consent, but by law. Unlike traditional agency relationships, the association between a union and non-member employees is not shaped by the agreement of the parties, but is imposed by statute. Therefore, the scope of the union's agency function corresponds to the extent of its statutory authority to represent non-member employees. Because that authority is confined to collective bargaining, contract administration or grievance adjustment, it follows that agency fees may be used only for those purposes.[10]

It is not necessary now to decide whether the scope of the union's agency function—and hence the extent of its permissible use of employee funds—is the same with respect to union members as it is with respect to non-members. The contractual arrangements between the union and its members are not before us. Nor is it necessary to decide whether a union's use of members' dues for purposes outside the scope of its agency function should properly be remediable by the courts, or should be left to be resolved through internal union processes.[11]

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[10] Of course, it is possible that non-member employees might voluntarily choose collaterally to extend the statutory right of representation, and thereby contractually to use the union as their agent for some purpose unrelated to collective bargaining. To that extent, the scope of the union's agency function would be defined by mutual consent, and could be treated under traditional principles of contract law and agency law. Amounts spent by the union pursuant to such express authorization by non-member employees would not involve a breach of the duty of fair representation.

Here, however, there is no indication of mutual consent extending the union's authority beyond that spelled out by statute.

[11] Chief Judge Winter asserts, *post* at 4, that "[a]gency fees are the equivalent of union dues," and that for the purposes of

Those questions are not presented here, because none of the plaintiffs are union members.

My conclusion is not foreclosed by the legislative history of the Taft-Hartley Act, which is retraced in Chief Judge Winter's panel dissent. *Beck v. Communications Workers of America*, 776 F.2d 1187, 1215-18 (4th Cir. 1985). In the first place, it should be borne in mind that the 1947 Congress' failure to enact legislation imposing limits on union spending is an instance, not of positive action, but of inaction. As the Supreme Court has pointed out, "[o]rdinarily, and quite appropriately, courts are slow to attribute significance to the failure of Congress to act on particular legislation." *Bob Jones University v. United States*, 461 U.S. 574, 600 (1983). "'Unsuccessful attempts at legislation are not the best of guides to legislative intent,'" *id.*, *quoting Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 382 n.11 (1969), because, rather than indicating a clear intent, "[c]ongressional inaction frequently betokens unawareness, preoccupation, or paralysis." *Zuber v. Allen*, 396 U.S. 168, 185-86 n.21 (1969).

Second, insofar as any congressional intent may be discerned from Congress' failure to act, the legislative

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regulating union expenditures members and non-members should be treated alike. That view overlooks an important distinction between members and nonmembers: members have the right to vote in union elections. By exercising their right to vote, union members can indirectly control the union's spending decisions. Nonmembers, who do not have a right to vote, lack any power over union policy-making and must trust in the good faith of union officials in protecting their interests. The union member's voting power might or might not justify a determination that the relationship between a union and its members is not sufficiently fiduciary to warrant judicial intervention with respect to expenditures of dues for non-collective bargaining purposes; that question is not before us here. What is clear, however, is that the non-union member, who lacks any means of imposing limits on the freedom of union officials to deal with his compulsory contributions, is in a situation quite different from that of the union member and of the kind that traditionally calls for judicial protection.

history indicates merely that Congress chose not to restrict unions' expenditures of employees' funds through the use of unfair labor practice provisions. Nothing in the legislative history indicates that Congress intended to preclude the development of such restrictions by the courts under the principles of the duty of fair representation.[12] Finally, even if the legislative history of the Act may be read affirmatively to permit union expenditures of *members' dues* for purposes unrelated to collective bargaining—thereby foreclosing the possibility of a breach of the duty of fair representation based on such expenditures—the legislative history is altogether silent on the question of union uses of *non-members' agency fees.* The provisions of the House bill regulating the "reasonableness" of union exactions, which were ultimately rejected by the Conference Committee, were concerned only with members' dues, and not with fees paid by non-members. H.R. 3020, 80th Cong., 1st Sess. §§ 7(b), 8(c)(2) (1947). The opponents of those provisions, whose view prevailed in the final version of the statute, acted on the basis of a conviction that the government should avoid the policing of internal union affairs, H.R. Rep. No. 245, 80th Cong., 1st Sess. 76 (1947) (minority views); 93 Cong. Rec. 6601 (1947) (statement of Sen. Taft)—not of matters involving outsiders to the union.[13] There is simply no indication in the legislative history that Congress intended that unions should be free from legal accountability for their collec-

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[12] Congress was aware, at the time of the enactment of the Taft-Hartley Act in 1947, of the judicial implication of the duty of fair representation under the federal labor statutes. The duty had first been recognized three years earlier in *Steele v. Louisville & Nashville, R.R.*, 323 U.S. 192 (1944).

[13] Congress later overcame many of its objections to governmental intrusion into internal union affairs with the passage of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.*, which established a "bill of rights" for union members against their union leadership.

tion and use of non-members' fees.[14] The legislative history, then, poses no obstacles to the view that union

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[14] Chief Judge Winter argues, *post* at 4-6, that Congress in 1947 consciously adopted a "hands off" approach to unions' expenditures of agency fees. In my view, that inference is simply too tenuous to be accepted. None of the evidence pointed to by Judge Winter provides any real support for that conclusion. On the contrary, both § 8(d)(4) of the original House bill, *reprinted in* 2 *Legislative History of the Labor Management Relations Act* 56-58 (1948), which was a precursor of the present proviso to § 8(a)(3), and the remarks of Senator Taft in the Senate debates, 93 Cong. Rec. § 4400 (April 30, 1947), *reprinted in* 2 *Legislative History of the Labor Management Relations Act* 1142 (1948), indicate that their authors were focusing on the question of union *membership*.

It is true that both the drafters of the House bill and Senator Taft endorsed the union shop, but the union shop is not the same as the agency shop. Both differ from the closed shop in that the employer is not obligated to hire employees only from among persons who are *already* union members. However, under a union shop arrangement, new employees must become, or at least seek to become, union members within a brief period after their employment commences. While the union may deny them membership, they cannot choose to remain nonmembers. In an agency shop, on the other hand, membership in the union is entirely optional. Judge Winter has pointed to nothing in the legislative history that suggests that Congress consciously focused on the latter kind of arrangement. The portions of the House bill and the Senate debates cited by the dissent reveal a concern for the would-be union member who is denied membership in a union shop arrangement, but they have no bearing on agency shops or agency fees.

No discussion of Congress' intent in the Taft-Hartley Act with respect to agency shop arrangements can ignore the Supreme Court's decision in *NLRB v. General Motors*, 373 U.S. 734 (1963). There, the Court held that the proviso to § 8(a)(3), which exempted union shop arrangements from prohibition as an unfair labor practice due to their discriminatory nature, also extended to agency shop agreements. The Court's decision was undoubtedly correct, but it was not based on a perception that Congress consciously considered the problem of agency shops in 1947. Rather, implicitly acknowledging the lack of evidence of any such conscious consideration, the Court looked to the interpretation that would be most consistent with "the desire of Congress to reduce the evils of compulsory unionism while allowing financial support for the bar-

expenditures of agency fees collected from non-members for non-collective-bargaining purposes violates the duty of fair representation.

III.

Because I have concluded that the plaintiffs here are entitled to the relief they seek, I must, like Judge Russell and those aligned wth him, reach the union's second assignment of error—their contention that the special master and the district court applied the wrong standard of proof in determining which categories of union expenditures were permissible. On this issue, I agree that the proper standard is one of preponderance of the evidence, *Ellis v. Brotherhood of Railwaq Clerks*, 446 U.S. 435, 457 n.15 (1984), and that all disputed factual issues should therefore be remanded for redetermination under the correct standard of proof.

IV.

In recapitulation, it appears, on reading Judge Russell's *en banc* opinion, that:

1) The Court has concluded that the plaintiffs are entitled to relief, by a vote of five who find that the defendants have breached a duty imposed on them by § 8(a)(3), and of one who finds no violation of § 8(a)(3), but concludes that the duty of fair representation created principally by § 9(a) has been infringed, as against four who deny any statutory violation.

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gaining agent." *Id.* at 744. While that broad congressional purpose can easily support the conclusion drawn from it in *General Motors*, it simply cannot, without severe logical strain, be made the basis of an inference that Congress considered and rejected the posibility of any restrictions on unions' expenditures of agency fees. Indeed, if anything, it cuts the other way: imposing fiduciary responsibilities on unions with respect to agency fee expenditures would tend to reduce the burdens of compulsory unionism for the non-member employee, while at the same time guaranteeing the union financial support for its collective bargaining activities.

2) The constitutional grounds asserted as a basis for recovery by the plaintiffs have received support from Judge Russell and Judge Chapman. Five members of the Court (Chief Judge Winter, Judge Hall, Judge Phillips, Judge Sprouse and I) have concluded that no such constitutional basis for relief exists. Three Court members (Judge Widener, Judge Ervin and Judge Wilkinson) have not reached the question, considering it unnecessary to do so in light of the posture of the Court on the statutory issue.

3) By a vote of six, the Court has decided that there must be remanded for a proper allocation as among permissible and impermissible expenditures chargeable to the plaintiffs such items as were not specifically determined in the panel majority opinion to be permissible or unallowable. The remaining four members of the Court have not reached the question.

WINTER, Chief Judge, dissenting:

For the reasons set forth in the dissenting panel opinion, Beck v. Communications Workers of America, 776 F.2d 1187, 1214-25 (4 Cir. 1985), I conclude that the judgment of the district court should be reversed and it should be directed to dismiss the complaint.[1] From a contrary disposition, I respectfully dissent.

Although the dissenting panel opinion sets forth what I consider to be the correct resolution of the legal is-

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[1] The dissenting panel opinion spoke to the issues of state action and the duty of a union under § 8(a)(3) of the National Labor Relations Act because the panel majority based its judgment on both. The in banc majority has declined to consider the issue of state action. It is interesting to note, however, that the Second Circuit in Price v. International Union, —— F.2d —— (July 16, 1986), has emphatically rejected the view of the panel majority on the state action issue.

sues presented by this appeal, I am constrained to comment on the separate opinion of Judge Murnaghan.

The thesis advanced by Judge Murnaghan is essentially one of his own devising. It is not one advanced by the parties and litigated by them. Although the in banc per curiam opinion now claims that the majority panel opinion rested, in part, on Judge Murnaghan's theory, the weakness of the claim is fully exposed in note 3 of what Judge Murnaghan has written. Certainly a single obscure reference in almost twenty-five pages of text, is a fair indication that not much reliance was put on the theory.

In any event, Judge Murnaghan expresses the view that while § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), does not prohibit unions from spending agency fees for purposes unrelated to collective bargaining, grievance adjustment, or contract administration, a union's duty of fair representation under § 9(a) of the Act, 29 U.S.C. § 159, prohibits such expenditures with agency fees collected from dissenting employees. Judge Murnaghan's view does not withstand close scrutiny.

The duty of fair representation is a judicial doctrine derived from the statutory duty of representatives designated or selected for the purposes of collective bargaining to "be the exclusive representatives of *all* of the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." § 9(a) (emphasis added)". The doctrine was first formulated with respect to the Railway Labor Act, Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944), and it was extended to the National Labor Relations Act in Ford Motor Co. v. Huffman, 345 U.S. 330 (1953). As described in Vaca v. Sipes, 386 U.S. 171, 177 (1967):

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated

> unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.

As the cases demonstrate, the doctrine is generally invoked to redress discriminations by a union on the basis of race, because of animosiy toward a member of the bargaining unit, in short, because of any irrational, unequal, unfair treatment of a member of the bargaining unit. It has been held that the doctrine is inapplicable to internal union matters that do not involve the employer such as the expenditure of dues. *See* Price v. International Union, —— F.2d —— (2 Cir., July 16, 1986).[2] It hardly seems applicable where the union's challenged expenditures were made equally on behalf of all members of the collective bargaining unit, dues paying union members and agency-fee paying nonunion members alike. Absent proof that a union acted arbitrarily, discriminatorily, or in bad faith in spending its revenues, there is no breach of the duty of fair representation even if the employer is also involved. *See Price, supra.*

More importantly, it would seem obvious to me that the duty of fair representation, derived from § 9 of the Act, cannot be transgressed if a union does only what Congress has intentionally refrained from prohibiting it to do. As the dissenting panel opinion spells out in detail, 776 F.2d at 1215-18, Congress was fully aware of proposals to limit the use of monies collected from mem-

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[2] *Price* also points out that suit for breach of the duty of fair representation will ordinarily not be entertained until there has been an exhaustion of internal union remedies. Whether there was exhaustion of any available remedies in this case is far from clear. Perhaps non-exhaustion was the reason why the parties did not advance the argument constructed by Judge Murnaghan.

bers of the bargaining unit for purposes not directly related to collective bargaining, grievance adjustment, etc. It took testimony protesting the expenditure of such monies for political purposes, and it considered a number of legislative proposals to prohibit or severely limit such expenditures. In the final analysis, it rejected all of the proposed restrictions and enacted legislation only limiting excessive or discriminatory initiation fees for union membership, 29 U.S.C. § 158(b)(5), and prohibiting the use of monies collected in connection with federal elections, 2 U.S.C. § 441(b)(3).[3] It is abundantly clear from the legislative history of these provisions that more stringent regulation was rejected as a matter of legislative judgment and not because of any thought that regulation was unnecessary because the judicial doctrine of fair representation established at the time that Congress considered the issue of regulation accomplished that result.[4] From my study of the legislative history, I think

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[3] Plaintiffs make no claim that either of these restrictions was violated.

[4] It is disingenuous to assert that the members of Congress who vigorously debated the union security provision of § 8(a)(3) were aware that regardless of their legislative compromise, the judiciary remained free to imply additional limitations under the duty of fair representation. *See ante* at 22 & n.11 (Murnaghan, J., concurring). It is true that the Supreme Court first recognized that duty in Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) three years before Congress enacted the Taft-Hartley Act. But *Steele* merely held that under the Railway Labor Act, a union could not refuse to represent black employees in the collective bargaining process because it had a "duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." *Id.* at 203. Unlike the present case where Judge Murnaghan implies from the Act a limitation that Congress rejected, the *Steele* could could fairly state that a duty to represent all the workers of a unit in collective bargaining with the employer "expresse[d] the aim of Congress." *Id.* at 202. Three years later when Congress decided as a matter of national labor policy to reject proposed limitations on union dues, it is untenable to think that it was "aware" that the *Steele* decision

it sheer sophistry to assert that Congress decided on a course of very limited regulation only with respect to dues from union members and not also with respect to agency fees. Agency fees are the equivalent of union dues, and it is inconceivable to me that Congress specifically intended not to regulate the expenditure of union dues except in minor respects but, by mere silence, intended the expenditure of agency fees to be regulated under the judicial doctrine of the duty of fair representation.[5]

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might serve to accomplish the same thing. It is testament to the unforeseeability of this reading of *Steele* that no other court has expanded the duty of fair representation for nearly forty years.

[5] Judge Murnaghan argues, *ante* at 22-23, that the legislative history only shows that Congress rejected limits on union expenditures of *members'* dues, leaving open the possible regulation of nonmembers' agency fees. It is true that the provisions of the House bill limiting initiation fees and dues to "reasonable" amounts expressly applied only to "members." H.R. 3020, 80th Cong., 1st Sess. §§ 7(b), 8(c)(2) (1947); *see Beck*, 776 F.2d at 1216 (Winter, C.J., dissenting). But the union security agreement provision of that bill, § 8(d)(4), much like the present § 8(a)(3), would have made it an unfair labor practice for the employer to deny employment to individuals whose membership was denied despite their "tender[ing] to the [labor] organization the initiation fees and dues *regularly imposed as a condition of membership therein* . . . ." Nonmembers had a right to work under this bill if they tendered the dues "regularly imposed" on *members*, and, thus, through § 8(d)(4) the reasonableness limitations would have applied to agency fees. In rejecting this bill, Congress rejected the regulation of fee collection from members *and* nonmembers for reasons applicable to both. The House Minority Report criticized the bill's attempt to monitor union fees as an undue regulation of unions' internal affairs that, as a practical matter, was unenforceable because of "the infinite details involved in the internal functioning of thousands of trade-unions having millions of members." H.R. Rep. No. 245, 80th Cong., 1st Sess. 76 (1947) (Minority Report); *see Beck*, 776 F.2d at 1216 (Winter, C.J., dissenting). As the dissenting panel opinion notes, the proceedings of this one case, requiring over nine years, over 4,000 pages of testimony, over 3,000 documents, two district judges and a special master, "exemplify

As I view it, the concurring opinion simply fails to appreciate the delicate compromise the Taft-Hartley Act managed to achieve. Congress considered the arguments of those who sought to prohibit all union security agreements, and those who wished to retain all such agreements, including the "closed shop." Senator Taft took a middle position, distinguishing between closed shops and the "union shop." Under his compromise, an employee could work at a unionized facility without acquiring membership, but only as long as he "pa[id] the same dues as other members of the union." 93 Cong. Rec. § 4400 (daily ed. April 30, 1947), *reprinted in* 2 Legislative History of the Labor Management Relations Act, 1947, at 1142 (1948). Senator Taft explained that the bill thus prohibited the closed shop and guaranteed that a worker could "get a job without joining the union or asking favors of the union . . . ." 2 Legislative History, *supra*, at 1422. Once assured of this right to work without union membership, however, Senator Taft asserted that "[t]he fact that the employee will have to pay dues to the union seems . . . to be much less important." 2 Legislative History, *supra*, at 1422. *See also id.* at 1010-11, 1096-97, 1403 (remarks of Senator Taft). Thus, the compromise that became law intended to permit union security agreements requiring nonmembers to tender the same dues to the union that members regularly paid. So far as payments to the union were concerned, members and nonmembers were on a parity and treated alike. In deciding whether to disturb this legislative solution, we should be guided by the Supreme Court's reasoning in Local 1976, United Brotherhood of Carpenters and Join-

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precisely the situation that Congress decided to avoid in defeating the amendment to supervise union dues collection." *Beck*, 776 F.2d at 1218 (Winter, C.J., dissenting). The result is identical, and equally offensive to Congressional intent, whether accomplished through the interpretation of § 8(a)(3), or the expansion of the duty of fair representation.

ers v. N.L.R.B., 357 U.S. 93, 99-100 (1958), deciding a secondary boycott issue:

> It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy . . . when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable secure its embodiment in enacted law. The problem raised by these cases affords a striking illustration of the importance of the truism that it is the business of Congress to declare policy and not this Court's.

Thus I would conclude that when a union expends agency fees for purposes unrelated to collective bargaining, grievance adjustment, or contract administration, not otherwise specifically prohibited by the Act, such expenditures are not outlawed under the duty of fair representation.

Judges Hall, Phillips, and Sprouse authorize me to say that they concur in these views.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-1955

HARRY E. BECK, JR.; DORIS R. AMBROSE; JACQUELINE S. BRANDON; MARY ANNA COX; SALLY B. DIMAURO; RUE T.F. DOWNEY; KATHLEEN A. HEIL; JOHN J. HURLEY; HARRIETT LIPSCHULTZ; CLAY B. LUTZ; BARBARA MCGAUGHEY; ROLAND R. MERKLE; ETHEL T. MERRYMAN; DORIS J. MORROW; MARION F. NORTHROP; FRANCES M. PHILLIPS; VIVIAN REEDY; BARBARA A. RUSSELL; LOIS A. STALLINGS; HARRY B. SWARTZ, SR.,
Appellees,

versus

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), an unincorporated Labor Organization; C.W.A. COMMITTEE ON POLITICAL EDUCATION (C.W.A. COPE); C.W.A. DISTRICT II; LOCAL 2100 OF C.W.A.; LOCAL 2101 OF C.W.A.; LOCAL 2108 OF C.W.A.; LOCAL 2110 OF C.W.A.,
Appellants,

and

LOCAL 2350 OF C.W.A.; AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), a Federation of National and International Labor Organizations; AFL-CIO COMMITTEE ON POLITICAL EDUCATION; MARYLAND STATE AFL-CIO; AMERICAN TELEPHONE & TELEGRAPH, a Corporation; C & P TELEPHONE COMPANY OF MARYLAND, a Corporation,
Defendants.

No. 83-1956

HARRY E. BECK, JR.; DORIS R. AMBROSE; JACQUELINE S. BRANDON; MARY ANNA COX; SALLY B. DiMAURO; RUE T.F. DOWNEY; KATHLEEN A. HEIL; JOHN J. HURLEY; HARRIETT LIPSCHULTZ; CLAY B. LUTZ; BARBARA McGAUGHEY; ROLAND R. MERKLE; ETHEL T. MERRYMAN; DORIS J. MORROW; MARION F. NORTHROP; FRANCES M. PHILIPS; VIVIAN REEDY; BARBARA A. RUSSELL; LOIS A. STALLINGS; HARRY B. SWARTZ, SR.,
Appellants,

versus

COMMUNICATIONS WORKERS OF AMERICA (C.W.A., an unincorporated Labor Organization; C.W.A. COMMITTEE ON POLITICAL EDUCATION (C.W.A. COPE); C.W.A. DISTRICT II; LOCAL 2100 OF C.W.A.; LOCAL 2101 OF C.W.A.; LOCAL 2108 OF C.W.A.; LOCAL 2110 OF C.W.A.,
Appellees,

and

LOCAL 2350 OF C.W.A.; AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), a Federation of National and International Labor Organizations; AFL-CIO COMMITTEE ON POLITICAL EDUCATION; MARYLAND STATE AFL-CIO; AMERICAN TELEPHONE & TELEGRAPH, a Corporation; C & P TELEPHONE COMPANY OF MARYLAND, a Corporation,
Defendants.

Appeals from the United States District Court
for the District of Maryland, at Baltimore
James R. Miller, Jr., District Judge. (C/A M-76-839)

Argued: November 1, 1984. Decided: October 24, 1985

Before WINTER, Chief Judge, and RUSSELL and CHAPMAN, Circuit Judges.

Laurence Gold (James Coppess; George Kaufman on brief) for Appellants/Cross-Appellees; Edwin Vieira, Jr. (Joseph J. Hahn on brief) for Appellees/Cross-Appellants.

RUSSELL, Circuit Judge:

Plaintiffs in this suit are twenty non-union employees [1] of either the American Telephone and Telegraph Company (AT&T) or its subsidiary Chesapeake and Potomac Telephone Company (C&P) and, as such, are subject to an "agency shop" agreement [2] negotiated between the employers and the Communications Workers of America (CWA) and its locals as the exclusive bargaining agents of such employees under the terms of section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(3).[3] Plaintiffs are required under the agreement to pay agency fees to CWA through its locals in an

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[1] A number of other employees joined as plaintiffs while suit was proceeding.

[2] Professor Cantor has explained that an agreement as authorized under § 8(a)(3) creates actually an "agency shop":

> Although the statutory language refers to union 'membership' as a condition of employment, the NLRA has been interpreted to refer to 'financial core membership' rather than full union membership. Thus what appears to be a union shop authorization is actually an agency shop authorization.

Cantor, *Uses and Abuses of the Agency Shop*, 59 Notre Dame L. Rev. 61 n.2 (1983).

[3] Plaintiffs' employers and the AFL-CIO were named as defendants in the complaint, but on motion they were dismissed as defendants leaving only CWA and its locals as defendants in the action. There is no appeal from this dismissal.

amount equivalent to the dues paid by union members. Their complaint is that defendants CWA and its locals have expended a part of their agency fees for purposes unrelated to "collective bargaining, contract administration, and grievance adjustment." Plaintiffs' claim such expenditures constitute a violation of their First Amendment rights of free speech and association justiciable under 28 U.S.C. § 1331 and 42 U.S.C. § 1983, and a violation of defendants' duty to fairly represent all employees justifiable under 28 U.S.C. § 1337 and 29 U.S.C. § 185(a).[4] Plaintiffs sought a declaratory judgment against defendants establishing the illegality of the excessive exactions, injunctive relief against continued illegal exactions by CWA and its locals, and monetary judgment for past illegal collections by CWA and its locals.

CWA alleged in its answer that "all actions taken by CWA defendants [were] consistent with the duties and obligations imposed [upon CWA] as recognized or certified collective bargaining representative of the plaintiffs under the National Labor Relations Act." They also asserted that plaintiffs were without standing to maintain the action, that plaintiffs had failed to exhaust available internal union remedies, that the court lacked jurisdiction over the subject matter of the action, and that the action was barred by the statute of limitations.

After informal discovery, defendant CWA moved to dismiss the action for failure of plaintiffs first to exhaust internal union procedures or, alternatively, for a stay

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[4] Jurisdiction in actions such as this are sometimes sustained under 28 U.S.C. § 1337, and at other times under § 185 of the Labor-Management Relations Act, 29 U.S.C. § 185, or under both. For an instance of an action maintained under § 185, *see Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 411-412 (10th Cir. 1971). The action, however, was later dismissed on the ground that the union had "adopted a complying intra-union remedy" in the form of a good faith rebate procedure. *Reid v. International Union*, 479 F.2d 517, 520 (10th Cir.), *cert. denied*, 414 U.S. 1076 (1973).

pending such exhaustion.[5] CWA submitted in support of the motion a resolution of the Executive Committee of CWA adopted on June 19, 1974. This resolution provided that:

> Any member or non-member who is covered by a collective bargaining agreement containing a 'Union Shop' or 'Agency Shop' provision shall have the right to object to the expenditure of a portion of dues or agency fees for activities or causes primarily political in nature, and shall be entitled to the refund of a portion of such dues under the terms, conditions and procedures contained in this statement of policy.

The resolution further provided that the Administrative Committee of the Executive Board of CWA should determine the approximate annual proportion of dues or agency fees spent for activities or causes primarily political in nature as of March 31st of each year. By affidavit, defendants said that for the year ending March 31, 1976, the impermissible expenditures for political purposes amounted to 7.63 percent of the fees collected. CWA also alleged that its auditors were attempting to arrive at, for use in succeeding years, a figure estimating the proportion of expenditures made by the unions for political purposes. Should any member or non-member object to the allocation determination, he could appeal to the Executive Board and from the Executive Board to the Union Convention.[6]

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[5] It is significant that defendants did not in their motion to dismiss raise the jurisdictional objection that plaintiffs' constitutional claim failed because of the alleged absence of "state action," though several years later, as we later note, they raised this point.

[6] There can be little doubt that this resolution had its genesis in *Brotherhood of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 122 (1963), in which the Supreme Court, in dealing with objections to the exaction under the Railway Labor Act (RLA) of union dues to be used for impermissible purposes, threw out this observation: "The difficulties in judicially administered relief [in fashioning a

The district judge advised both parties that, preliminary to a hearing on defendants' motion for summary judgment based on their rebate procedure, he wished the advice of counsel on the impact of *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) on the issues in the case. Counsel for CWA responded in a letter dated June 3, 1977 and incorporated as a part of the record in this case. After indicating that *Street*[7] and *Hanson*[8] arose under the RLA and that *Abood* dealt with public employees, CWA's counsel expressed the opinion that *Abood* was not directly in point. But he added:

> The principal opinion's discussion [in *Abood*] of national labor policy and decisions under the National Labor Relations Act would seem to indicate

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remedy for a violation under the RLA] . . . should, we think, encourage petitioner unions to consider the adoption by their membership of some voluntary plan by which dissenters would be afforded an internal union remedy." This idea was repeated in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 240 (1977).

As a result of this observation, unions generally developed rebate schemes somewhat similar to that adopted by CWA and such rebate schemes became the first line of defense by unions in suits such as this one. Many of these rebate schemes, however, were fairer than the one involved in this case, where the right of appeal by the dissenting employees is restricted to a union-constituted body and never to an impartial board. *Cf. Ellis v. Brotherhood of Ry., Airline and S.S. Clerks*, 685 F.2d 1065, 1069 (9th Cir. 1982), in which "[a]ny employee who believes his or her rebate inadequate may appeal directly to an independent Public Review Board authorized to make final determinations on such appeals." The rebate scheme in *Ellis*, with its more impartial appeal scheme, was, however, found invalid on other grounds by the Supreme Court in *Ellis v. Brotherhood of Ry., Airline and S.S. Clerks*, —— U.S. ——, ——, 80 L.Ed.2d 428, 439 (1984). Prior to *Ellis*, courts had varied in their treatment of this defense. *Reid v. International Union*, 479 F.2d at 520; *Perry v. Local Lodge 2569*, 708 F.2d 1258, 1262 (7th Cir. 1983).

[7] *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961).

[8] *Railway Employee's Dept. v. Hanson*, 351 U.S. 225 (1956).

> that the principles of *Hanson* and *Street* interpreting the Railway Labor Act apply equally to non-railway employees. Several lesser courts have so held. The problem is that the Supreme Court appears to use the terms 'ideological purpose,' 'political purposes,' and 'purposes other than collective bargaining,' interchangeably. The Court gives little guidance as to which expenditures it considers to be refundable to an agency fee payor.

CWA's counsel concluded his letter with this statement:

> If plaintiffs are willing to agree that the Supreme Court decisions mean only that the Union defendants must make a provision for pro-rata refund of that portion of the dues dollar expended upon political activities, the procedure is in effect [under the resolution of the Executive Committee] and this case should be settled. If plaintiffs intend to insist upon a much broader interpretation of those expenses for which they feel they are not responsible, no settlement is in sight. . . . [and plaintiffs must proceed under the appeal procedure established by the resolution.] [9]

Plaintiffs did not agree to submission to CWA's internal union remedies and the matter came on for determination by the district judge. Finding exhaustion of internal union remedies not required,[10] the district judge proceeded to find that the agency shop agreement was valid subject to the limitation that CWA could not "collect and disburse [as the exclusive bargaining agent under such agreement] such 'agency fees' for purposes other than 'collective bargaining, contract administration, and

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[9] It will be noted that defendants did not in this letter raise or indicate that there was any jurisdictional defect in the proceedings.

[10] There is no appeal from this decision. The inadmissibility of the exhaustion defense, with its reliance on the union's rebate procedure, is therefore not an issue on this appeal.

grievance adjustment' without seriously implicating the first amendment rights of free speech and association of fee payors who object." *Beck v. Communications Workers*, 468 F.Supp. 93, 96 (D.Md. 1979) (quoting *Abood*, 431 U.S. at 225-226). On the basis of that finding, he denied defendants' motion to dismiss and granted a declaratory judgment that collections by the union from objecting employees in an amount "beyond that allocable to collective bargaining, contract administration and grievance adjustment" were illegal as violative of "the first amendment rights of the plaintiffs." 468 F.Supp. at 97. He ruled that it was necessary to determine "what proportion of the union's total expenditures is attributable to activities other than collective bargaining, contract administration and grievance adjustment," and, in that determination, he said: "[t]he burden of proving such proportion rests upon the union, but '[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required.'" *Id.* (quoting *Allen*, 373 U.S. at 122). Finally, he provided that if the parties were unable to agree within thirty days on the amount to be refunded under the guidelines as stated by him, the matter of allocation should be referred to a master for the purpose of determining "what portion of the agency fees the defendant has collected improperly."

Since there was no agreement between the parties on the proper allocation, a special master was appointed. At the initial hearings before him, the special master received twenty-eight days of testimony and argument as well as 2,100 documentary exhibits. In his first report, filed August 18, 1980, he found that only 19 percent of CWA's total expenditures were related to and were reasonably necessary for the proper effectuation of permissible purposes. The special master accordingly recommended that CWA be ordered to refund to plaintiffs 81 percent of the agency fees collected in the past and that CWA be enjoined from collecting from plaintiffs more

than 19 percent of the dues and assessments charged CWA members.

After the filing of the special master's report, CWA moved the district court to remand the matter to the special master. In support of the motion, CWA filed a memorandum stating:

> A re-reference is initially required because the master failed to determine the extent of the plaintiffs' financial obligation as to the 60% of the agency fees retained by the local union, although the issue was part of the reference to the master. Re-reference to the master is also appropriate because the national union is prepared promptly to provide a new basis for the determination of its future entitlement, a circumstance which the master recognized would warrant further proceedings and, upon proper proof, an injunction different from the terms proposed in the master's August 1980 report. *The national union proposes to meet the master's proof requirements by (1) offering a full return to the plaintiffs of their entire fee payment to the national union from its beginning in 1976 to the end of the present fiscal year [1980], and (2) utilization during the final third of the national union's 1980 fiscal year, which commences on December 1, 1980 of contemporaneous time records for officers and employees which will provide a basis for determination of the plaintiffs' financial obligation to the national union thereafter.* (emphasis added)[11]

Time for filing exceptions to the report of the special master was extended until after determination of the

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[11] Again, it is of interest that defendants at this point did not indicate that a jurisdictional problem existed. Actually, the statement of position suggested that defendants in effect conceded the partial invalidity of their collection and use of the dues-equivalent and thus conceded partial liability.

motion to recommit. In the meantime, Laurence Gold, Esquire, had been retained as lead counsel for CWA in this litigation. He wrote counsel for plaintiffs a letter dated October 16, 1980, made a part of the record in this proceeding, in which he proposed:

> As a result of my discussions with the CWA national union, I have now been authorized to advise you that the national offers to pay to the individual plaintiffs in the above-noted case the full amount of monies paid by them as agency fees to the defendant CWA national union from January 1, 1976 to date and to waive such fees through the balance of the national's current budget year, *provided* that the parties can agree upon, and the District Court will enter, an order which will preserve for review without any *res judicata* or estoppel effect all issues which either party may wish to raise with respect to: (a) Judge Blair's rulings regarding the expenditures which may and may not lawfully be charged to agency fee payors and (b) all rulings of the master other than his factual findings allocating expenditures in accordance with those rulings.[12]

The district judge proceeded to grant the motion to recommit, but in so doing, he identified precisely the issues to be addressed on the recommital and provided that those issues should be resolved without further testimony unless the special master "deems it appropriate." *Beck v. Communications Workers*, No. M-76-839, slip op. at 3 (D.Md. Jan. 19, 1981). In connection with the objection of defendants to the absence of specific findings on the liability of the local unions, the district judge directed the special master to make findings in response to these questions:

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[12] It will be noted that counsel made no reference to any claim of want of jurisdiction over the cause in their statement of the issues on which they wished to reserve the right to object.

(1) What portion of the fees paid were retained by the local union defendants, and what portion was paid over to defendant CWA;

(2) What percentag of the fees retained by each local union defendant is attributable to permissible expenditures, as outlined by previous order of this court.

Id. at 2-3. The special master was also directed to make these additional findings in connection with future injunctive relief:

(1) Do the unions' current recordkeeping policies in any way alter the factual findings previously submitted to the court?

(2) If so, what method of computation would most accurately reflect the percentage of fees collected which are properly allocable to permissible activities?

(3) In what manner, if at all, may this computation procedure be made self-executing in order to compensate for future changes in union policies?

(4) How should the final injunction be framed in order to accomplish the objection (sic) set forth in this order and the prior orders in this action? *Id.* at 3.

After taking additional testimony, the special master filed his supplemental report in September, 1981. In this report he proceeded to answer the specific questions addressed to him by the district court. He found, in response to the first two questions posed relating to the liability of the local unions, that his "calculations of applicable percentages of permissible and impermissible expenditures by CWA [were] applicable to and control the expenditures by the four Local Unions, i.e., Local 2100, Local 2101, Local 2108 and Local 2110, including, of course, the 60 percent of the fees in question retained

by the Local Union Defendants." He added that "[t]his is *implicit* in the calculations appearing in Appendix F attached to the Original Report." The special master excused any lack of detail in his original report in this regard because of his desire to avoid unduly expanding his report, "especially when the Special Master concluded that the same deficiencies in meeting the required burden of proof to establish expenditures made for the three permissible categories—collective bargaining, contract administration and grievance adjustment—applicable to the CWA expenditures were also applicable to the Local Union expenditures." He found that, "giving the locals the benefit of every doubt," he could not find that more than 19 percent of the locals' share of the exacted fees were used for permissible purposes under the guidelines earlier stated by the district judge. In response to the other questions with which he was directed to report, he found that the unions' current record-keeping policies did not in any way alter his previous factual findings. He found that the new system proposed by the unions for future allocation of permissible costs, as reviewed in the testimony, was 'generally sufficient, prima facie to enable CWA to meet its burden of proof [i.e., by the standard of "clear and convincing" proof],' provided certain defects and omissions, detailed by the special master, were corrected or supplied. He concluded, however, that the system of calculation could not be made self-executing and would require periodic monitoring.

CWA and the local unions filed exceptions to the initial report and the supplemental report of the special master. In general, the objections of both the national and the local unions present the same contentions. The objections to the special master's findings of fact are stated in broad language and are incorporated in two general claims: First, they claim "[t]he categories of rebatable expenditures [by defendants as found by the special master] are too broad in that they give plaintiffs credit

for CWA expenditures in addition to those for political and ideological activities unrelated to collective bargaining"; [13] and second, the special master placed the burden of proof by "clear and convincing evidence" on the unions to establish the retainable portion of the agency fees paid by dissenting employees and drew inferences adverse to the unions for their failure to produce records.

Plaintiffs also filed objections to the special master's reports. In effect, they objected broadly that the special master had been too generous in its allowance of permissible expenditures by the unions against the claims of plaintiffs. They also found objectionable the conditional approval expressed by the special master of the union's proposed procedure for determining the amount of plaintiffs' agency fees to be refunded. Finally, they took exception to the special master's recommendation that plaintiffs "bear 19% of the costs of proceedings in which they are the prevailing parties."

On March 5, 1982, while the district judge was considering the objections of the parties to the special master's initial and supplemental reports, the unions petitioned for leave to file a Fed.R.Civ.P. 12(b)(6) motion for dismissal on the ground "that plaintiffs' complaint fails to state a claim upon which relief can be granted." In their memorandum in support of their motion, the unions referred to both plaintiffs' First Amendment cause of action and their claim that the unions' violated their duty of fair representation as set forth in plaintiffs' "Second Claim for Relief" appearing "in paragraphs 26, 27, and 28" of the complaint. Their position on the constitutional claim was that there was an absence of governmental action, which is a prerequisite for a justiciable First Amendment claim. They would fault the claim of a violation of the duty of fair representation

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[13] The exceptions do not identify specifically any expenditures which were improperly disallowed except those relating to "organizing."

because the agency shop is specifically authorized by statute, thereby validating the collection by the unions of the agency fees from dissenting non-union employees such as plaintiffs and that *after collection, the unions have "a due process right to spend the funds in any manner [they choose]."* (emphasis added)

The district court dismissed *sub silentio* defendants' 12(b)(6) motion and proceeded to sustain substantially the special master's recommendation with but slight variations. The court first corrected a mathematical error made by the special master, thereby increasing to 21 percent the amount properly chargeable to the agency fee payor plaintiffs. *Beck v. Communications Workers*, No. M-76-839, slip op. at 12-13 (D.Md. Aug. 9, 1983) (memorandum and order). Furthermore, the court modified the special master's recommended injunction by ordering CWA, after collecting 100 percent of the agency fees, to return to plaintiffs that percentage of such fees determined by an independent certified public accountant to be non-retainable as attributable to expenditures unrelated to collective bargaining, contract administration, and grievance adjustment. *Beck v. Communications Workers*, No. M-76-839, slip op. at 2-3 (D.Md. Aug. 9, 1983) (judgment). The district court also ordered CWA to maintain, for each fiscal year, an interest-bearing escrow account containing twice the amount determined in the previous fiscal year to be non-retainable. *Id.* at 3. In addition, the injunction provided that only if plaintiffs successfully challenged the amount determined to be non-retainable would CWA bear the cost of such challenge. *Id.* at 3-4. This appeal followed with both plaintiffs and defendants excepting to the rulings and conclusions of the district court. We address first the exceptions of defendants.

After six years of litigation, 4,000 pages of testimony, the introduction of over 3,000 documents, and innumerable hearings and adjudication of motions, defendants, in

their brief in this court, limit themselves to two claims of error, the first of which raises a question of a federal justiciable claim not advanced by defendants until they filed their motion for judgment under Rule 12(b)(6) made only after all evidence had been received and after the cause was ripe for disposition on the merits.[14] Their other claim of error relates to the standard of proof to be used in resolving plaintiffs' claim for a refund. The first claim of error by defendants to which defendants devoted almost eighty percent of their initial brief in this court, is directed at plaintiffs' claim that the collection and use of fees exacted of them by defendant unions under the authority of the agency fee agreement, for purposes other than those "germane to collective bargaining," are violative of plaintiffs' free speech and association rights under the First Amendment and their due process rights under the Fifth Amendment. Jurisdiction of such a constitutional action, plaintiffs opined, existed under 28 U.S.C. 1331. Defendants, on this appeal, contest that position. It should be emphasized at the outset that in raising this belated jurisdictional claim defendants do not dispute the factual base for plaintiffs' constitutional claim. The district judge found, within a

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[14] While the lateness of this claim may not be a bar to its consideration, nonetheless the failure of defendants to raise such contention until after all evidence had been taken and after defendants had consistently in the protracted proceedings acted on the assumption that there was jurisdiction of the subject matter is conduct not to be commended. Such delay places an intolerable burden on orderly and efficient judicial administration. They had earlier raised other defenses, all in vain, and CWA had actually offered on two occasions to rebate all collections of dues from dissenting non-union employees. The defense offered by defendants for their delay is that they did not raise the jurisdictional claim in 1979 because the jurisdictional ruling was unexpected. This excuse might have some credibility if defendants had acted promptly but to delay for years to raise the point undercuts the reasonableness of the excuse.

few months after this action was begun—on showings largely made by defendants themselves—that:

> In this case it is undisputed that the defendant union, CWA, has negotiated an 'agency shop' clause with the plaintiffs' employers which allows the union to collect dues-equivalent payments from the plaintiffs. . . . It is also clear that the plaintiffs object to the expenditure of their funds for purposes other than 'collective bargaining, contract administration, and grievance adjustment.' Finally, it is undisputed that CWA has spent and continues to spend an as yet undetermined fraction of its dues receipts and dues-equivalent agency receipts for purposes other than the three enumerated ones.[15]

Defendants have never contested those findings.

The legal basis asserted by defendants for this claim of lack of jurisdiction in the federal courts over the constitutional claim of plaintiffs is, to quote defendants' statement of their position in their brief, that "the plaintiffs' First Amendment claims fail because the defendant unions' negotiation of a union security clause valid under the National Labor Relations Act, as amended, and under applicable state law and the unions' expenditure of agency fees collected under such a clause is not state action subject to constitutional constraints." Brief for Appellants at 14. They concluded this statement of their position with: "If our position in this regard is accepted, the judgment of the district court should be reversed and the plaintiffs' constitutional claims should be dismissed." *Id.*

It would seem fair to assume from this statement of their position by defendants that, in their view, plaintiffs' case is restricted to a constitutional claim, and if

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[15] *Beck v. Communications Workers*, 468 F.Supp. 93, 96-97 (D.Md. 1979).

the constitutional cause of action fails for lack of jurisdiction, plaintiffs are without a federal judicial remedy. This assumption is further indicated by the failure of defendants in their initial brief even to notice or discuss plaintiffs' statutory claim. We take it that defendants posited that, since in their view the ruling of the district judge rested on constitutional grounds, the federal jurisdictional basis for judgment herein must stand or fall on whether jurisdiction can be sustained over plaintiffs' constitutional claim.

It is, however, a settled rule of appellate procedure "that a decision of the district court is not to be reversed if it has reached the correct result, even though the reason assigned by it may not be sustained." *See Stern v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 603 F.2d 1073, 1093 (4th Cir. 1979). The complaint herein states in separate counts not merely a cause of action charging a violation of the First Amendment in the compelled payment of the dues-equivalent under threat of loss of job, but also a cause of action under section 8 (a) (3) of the NLRA as construed by the Supreme Court, and related thereto, a violation by defendants of their duty of fair representation. Only if jurisdiction of these claims under section 8(a) (3) itself is non-existent would a dismissal of this action for lack of jurisdiction be appropriate. Nor would this result be different because the district court may have decided jurisdiction on the assumption that plaintiffs' action was based on the unconstitutionality of the compelled payments. If the judgment can be sustained because of jurisdiction over either the constitutional or the statutory claim of plaintiffs, the judgment will be sustained, though, as we later observe, courts prefer to decide the issue by a construction of the statute if confrontation of the constitutional issue can thus be avoided. That this is the accepted practice is illustrated by the decision of the Supreme Court in *International Association of Machinists v. Street*, 367 U.S. 740 (1961).

That case, which involved similar constitutional and statutory issues to those posed there under a similar statute and agency contract, was decided in the state court on constitutional grounds. On appeal, plaintiffs apparently pressed the constitutional claim. The Supreme Court, however, decided the case on statutory grounds, thereby avoiding review of the constitutional issue.

In their reply brief in this court, it is accordingly understandable that defendants chose not to persevere in their argument that the judgment herein must be reversed if the constitutional claim of defendants is not accepted, and defendants recognized the necessity of addressing the statutory claim, the maintenance of which did not require "state action." Since it seems clear to us that plaintiffs have stated a good cause of action for a violation of section 8(a)(3) of the NLRA redressable under 28 U.S.C. § 1337 and 29 U.S.C. § 185(a), as well as a claim of a violation of the duty of fair representation justiciable under 28 U.S.C. § 1331 and 29 U.S.C. § 185(a), we shall deal with this question before addressing the right of plaintiffs to maintain a constitutional claim on the same facts. We begin by considering both the language of and the legislative purpose of section 8(a)(3) of the NLRA, which provides the basis for plaintiffs' statutory claim.

Section 8(a)(3), added to the NLRA by the Labor-Management Relations Act of 1947 (Taft- Hartley Act),[16] provides permissive authority for an agreement between an employer and the exclusive union bargaining representative, selected in conformity with the terms of the NLRA, whereby employees are required to have union "membership" as a condition of employment, subject however, to the express condition that no employer could dis-

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[16] Act of June 23, 1947, ch. 120, Title I, § 101, 61 stat. 136, 140-141.

charge an employee "for nonmembership in a labor organization . . . if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(a)(3)(1983). The legislative purpose of section 8(a)(3), as evidenced in the legislative record, was twofold: First, Congress intended the elimination of the closed shop and the substitution of the union or agency shop; second, in response to the plea of the unions that the existing statute encouraged "free riders," employees who enjoyed the benefits of collective bargaining but shared none of the costs of the bargaining process, it included the "membership provision or requirement. *See* S. Rep. No. 105, 80th Cong., 1st Sess. 6-7 (1947); Legislative History of the Labor-Management Relations Act, 1947, at 413, 1422 (1948) (statements of Senator Taft); *Oil, Chemical & Atomic Workers International Union v. Mobil Oil Corp.*, 426 U.S. 407, 426 (1976) (Stewart, J., dissenting); *NLRB v. General Motors Corp.*, 373 U.S. 734, 740-741 (1963).

However, the "membership" requirement was quickly "whittled down to its financial core," because the Supreme Court found that "[t]his legislative history [of the statute] clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." *NLRB v. General Motors Corp.*, 373 U.S. at 742 (quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 41 (1954)). Accordingly, "[i]f an employee in a union shop unit refuses to respect any union-imposed obligations other than the duty to pay dues and fees, and membership in the union is therefore denied or terminated, the condition of 'membership' for § 8(a)(3) purposes is nevertheless satisfied and the employee may not be discharged for nonmembership even though he is not a normal member."

NLRB v. General Motors Corp., 373 U.S. at 743.[17] Thus, the extent of the objecting employee's obligation under the union or agency contract is the payment of dues, and the legislative history reveals that the obligation to pay dues was, it would seem, directly related to the costs of the collective bargaining itself.[18]

Prior to 1950, railroad workers, on the other hand, had been denied the right to have a union or agency shop. They sought similar rights to those enjoyed by employees in other industrial fields under section 8(a)(3). Congress responded to this demand by enacting section 2, Eleventh of the Railway Labor Act (RLA).[19] Evident of its intention merely to give railway workers similar rights to those of other workers under section 8(a)(3), "Congress [in phrasing section 2, Eleventh] simply tracked the language of Section 8(a)(3) of the Taft-Hartley Act." T. Haggard, *Compulsory Unionism, The NLRB And The Courts* 115 (1977). Further, the legislative record is replete with responsible representations that the intent was to confer on railway workers simply the same rights other workers had under section 8(a)(3). *Id.* at 127. Senator Hill, the manager of the bill in the Senate, assured the Senate that the intention of section 2,

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[17] This follows the comments of Representative Klein that while the statute purports to allow a union shop, the practical effect of the statute's insulation of ousted members against being fired by the employer so long as dues were paid was to "allow only a requirement that dues be paid." Legislative History of the Labor-Management Relations Act, 1947, at 655 (1948).

[18] Professor Cantor in his article, *Uses and Abuses of the Agency Shop, supra* note 2, at 75 n.64 recognizes this:

> "Where Congress has authorized compulsory extraction of a fee from workers in a represented unit, the monies must be spent in a manner consistent with the purpose for which the fee is extracted, effective representation of workers."

[19] Act of Jan. 10, 1951, ch. 1220, 64 stat. 1238-1239, codified at 45 U.S.C. § 152, Eleventh (1983).

Eleventh was "merely to extend to employees and employers subject to the Railway Labor Act rights now possessed by employees and employers under the Taft-Hartley Act in industry generally." 96 Cong. Rec. 15,737 (1950). Senator Taft, the co-author of section 8(a)(3), was equally explicit. He declared during debate that section 2, Eleventh "inserts in the railway mediation law almost the exact provisions . . . of the Taft-Hartley law, so that the conditions regarding the union shop and the check-off are carried into the relations between railroad unions and railroads." 96 Cong. Rec. 16,267 (1950). *See also* S.Rep. No. 2262, 81st Cong., 2d Sess. 3, 5 (1950); H.R. Rep. No. 2811, 81st Cong., 2d Sess. 405 (1950).

As is obvious, it would be difficult, if not impossible, to find two statutes more identical in language and legislative purpose than section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA.[20] It is inconceivable that two such statutes would be construed differently. For this reason it seems fair to assume that the construction given one by the Supreme Court would be equally applicable to the other, and we proceed on that basis in construing section 8(a)(3).

The first consideration of either of these statutes by the Supreme Court was in *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956). In that case, which involved a charge of unconstitutionality against section 2, Eleventh under the First Amendment free speech and association clause and the due process clause of the Fifth Amendment, the Court found the statute,

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[20] It is true there are differences between the RLA and the NLRA, and where there is "difference in the language and scheme of the two statutes" there will be differences in the application of the provisions of such Acts. *See Ruby v. American Airlines, Inc.*, 323 F.2d 248, 256 (2d Cir. 1963), *cert. denied*, 376 U.S. 913 (1964). This is not such a case. There is like statutory language and like legislative purpose here and, therefore, like statutory construction.

which authorizes the collection of a dues-equivalent from non-union, objecting employees by an exclusive bargaining representative of the employees, valid so far as the unions' use of the fees was for purposes "germane to collective bargaining" *Id.* at 235. The Court reserved ruling on the permissibility of the collection of the dues-equivalent from objecting employees "for purposes not germane to collective bargaining," though it was the clear implication of the decision that such use would be unconstitutional. *Id.* at 238.

Five years later in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), the Supreme Court was directly confronted with the question whether a union, acting as the exclusive bargaining representative under an agency contract as authorized under section 2, Eleventh, could constitutionally collect and use the dues-equivalent from an objecting employee in the unit for "political purposes." The result of sustaining this argument would have been a decision rendering the statute unconstitutional. The Court found it unnecessary, though, to consider the constitutionality of the union's collection and use of the dues-equivalent under the statute because it held that it was "not only 'fairly possible' but entirely reasonable" to construe the statute itself in a way making it unnecessary to consider the statute's constitutionality. *Id.* at 750. In adopting this procedure, the Court was merely following a rule often applied and recently restated in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, —— U.S. ——, ——, 80 L.Ed. 2d 428, 439 (1984): "When the constitutionality of a statute is challenged, this Court first ascertains whether the statute can be reasonably construed to avoid the constitutional difficulty." The Court, accordingly, looked to the legislative purpose of section 2, Eleventh. *See United States v. Security Industrial Bank*, 459 U.S. 70, 82 n.12 (1982); *Buckley v. Valeo*, 424 U.S. 1, 79 n.106 (1976); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Based

on its finding of the statute's legislative purpose, the Supreme Court held that, under section 2, Eleventh, unions were not vested with "unlimited power to spend exacted money" and they might not use such money to "support candidates for public office" or to "advance political programs" because those were not uses which help "defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes." *Street*, 367 U.S. at 768.[21] The Court, however, limited its decisions to the union's "power to use [the dissenting employee's] funds to support political causes which he opposes," saying:

> We express no view as to other union expenditures objected to by an employee and not made to meet the costs of negotiation and administration of collective agreements, or the adjustment and settlement of grievances and disputes. *Id.* at 769.

This construction of section 2, Eleventh, as stated in *Street*, was restated in *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113 (1963). In that case the Supreme Court said:

> Respondents' amended complaint alleges that sums exacted under the Agreement 'have been and are and will be regularly and continually used by the defendant Unions to carry on, finance and pay for political activities directly at cross-purposes with the free will and choice of the plaintiffs.' *This allegation sufficiently states a cause of action.* It would be impracticable to require a dissenting employee to allege and prove each distinct union political expenditure to

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[21] In *Ellis*, —— U.S. at ——, 80 L.Ed.2d at 436, the Supreme Court said that *Street* held that the RLA "does not authorize a union to spend an objecting employee's money to support political causes. The use of employee funds for such ends is unrelated to Congress' desire to eliminate 'free riders' and the resentment they provoked."

which he objects; it is enough that he manifests his opposition to *any* political expenditures by the union." *Id.* at 118 (emphasis added).

In *Ellis*, the Supreme Court followed *Street* and *Allen* in their statement of the principle that a statute challenged for unconstitutionality under the First Amendment may be sustained if, as a result of a reasonable narrowing construction consonant with the legislative purpose reflected in the statute, the constitutional objection may be removed or obviated. It found, as had the Court in the earlier cases, that the statute could reasonably be given such construction, and it proceeded to hold that expenditures from the dues-equivalent collected from objecting employees under an agency contract authorized by section 2, Eleventh could embrace expenditures "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed *to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.*" —— U.S. at ——, 80 L.Ed.2d at 442 (emphasis added). The Court then went beyond the holdings of its previous decisions, which had limited its interdiction of the use of the dues-equivalent to expenditures for "political activities" or "political expenditures" (*Allen*, 373 U.S. at 118-19), or "for the expression of political views, on behalf of political candidates, or towards the advancement of other ideological causes not germane to its duties as collective-bargaining representative (*Abood*, 431 U.S. at 235, or "for forcing ideological conformity or other action in contravention of the First Amendment" (*Hanson*, 351

U.S. at 238), or "to use [of the employee's] money to support political causes which he opposes" (*Street*, 307 U.S. at 768). Instead, the Court proceeded to identify more specifically certain expenditures which would be permissible and some which would not be permissible under the standards declared by the Court in the construction of section 2, Eleventh. Costs of national conventions, "refreshments for union business meetings and occasional social activities," publications "reporting [to employees] about those activities it can charge them for doing," and "litigation incident to negotiating and administering the contract or to settling grievances and disputes" were said to be permissible charges that could be legitimately made on a proportionate basis against objecting employees but not "organizing" expenditures, which are "outside Congress' authorization." —— U.S. at ——, 80 L.Ed. 2d at 442-445.

In the midst of its decisions construing section 2, Eleventh of the RLA, the Supreme Court dealt in *Abood v. Detroit Board of Education*, 431 U.S. 209, 223 (1977), with a state statute which authorized an agency shop under "a regulatory scheme which, although not identical in every respect to the NLRA or the Railway Labor Act, [was] broadly modeled after federal law." Accordingly, for guidance in construing that state statute "modeled" after section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA, the Supreme Court looked to the decisions in *Hanson* and *Street* under section 2, Eleventh. *Id.* at 225. It observed that "insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this Court appear to require validation of the agency-shop agreement before us." *Id.* at 225-26. But Michigan law also "permit[ed] union expenditures [by the union under the agency shop agreement] for legislative lobbying and in support of political candidates." *Id.* at 215. The Su-

preme Court invalidated on First Amendment grounds the Michigan statutory authorization for the use of fees collected from an objecting employee for such purposes, saying:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment. *Id.* at 235-236.[22]

It is defendants' position, though, that the construction of section 2, Eleventh as first stated in *Street* and later reiterated in *Allen* and *Ellis*, is inapplicable in the construction of section 8(a)(3), despite their similarity in language and purpose, and despite the use of those cases, in construing a similar Michigan statute in *Abood*. In its discussion of the statute in *Abood*, the Court likened that statute to section 8(a)(3) and section 2, Eleventh and then said that the Michigan statute was to be construed as those two federal statutes had been construed in *Hanson* and *Street*. It is difficult, therefore, to see the force of an argument that *Street*, *Allen*, and *Ellis* are not as relevant to the construction of section 8(a)(3) as they are to the construction of section 2, Eleventh. If those decisions were relevant to the construction of the statute in *Abood*, they are even more relevant in construing a like federal statute.

And defendants appear to have conceded as much in their formal presentation of their position to the district

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[22] For a full critique of *Abood*, *see generally The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 1, 158-198 (1977).

court in the letter of their counsel. In his letter of June 3, 1977, defendants' counsel advised the district court on the position of defendants thus: "The principal opinion's discussion [in *Abood*] of national labor policy and decisions under the National Labor Relations Act would seem to indicate that the principles of *Hanson* and *Street* interpreting the Railway Labor Act apply equally to non-railway employees." Moreover, one commentator suggested, even in advance of *Abood:*

> It is unlikely that the first amendment issue raised by political expenditures of forced contributions under the union's security agreements will be resolved in the private sector. The issue under the RLA has been mooted by *Street*, and the NLRA, which governs most other private employers, contains language authorizing union security agreements that is almost identifical to that in the RLA. Since the Supreme Court interpretated the RLA as prohibiting political expenditures, it would be almost certain to place a similar interpretation on that language in the NLRA.[28]

Even Professor Cantor, who is the most public critic of the limited use of union dues under an agency contract, supports this view. In his latest article, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 Rutgers L.Rev. 3, 41 n.219 (1984), he states:

> Although *Street* dealt only with RLA authorizations of a union shop, the NLRA provision contains virtually identical constraints. [citations omitted] RLA § 2 (11), adopted in 1951, was simply intended to confer on rail unions the same union security prerogatives conferred on industrial unions in 1947 in the Taft-Hartley Act. [citations omitted]

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[28] Blair, *Union Security Agreements in Public Employment*, 60 Cornell L. Rev. 183, 194 (1975).

> Thus, legislative history under both the RLA and the Taft-Hartley Act is relevant to assessing congressional intent in shaping the permissible bounds of union security provisions.

In Henkel & Wood, *Limitations on the Uses of Union Shop Funds After Ellis: What Activities are "Germane" to Collective Bargaining?* 35 Lab. L.J. 736, 743 (1984), the latest academic comment on the two statutes, the authors said:

> Second, it is apparent that *Ellis* will apply to claims brought under the NLRA. As noted in *Ellis*, Congress's purpose in allowing the union shop was to eliminate the free-rider problem, which arose from exclusive union representation. Congress favored exclusive union representations as a means of promoting labor peace. This notion of exclusive union representation 'underlies the National Labor Relations Act as well as the Railway Labor Act.' For this reason the policies behind the *Ellis* standard are just as applicable under the NLRA. The Ninth Circuit dealt with this issue in *Seay* [*Seay v. McDonnell Douglass Corp.*, 427 F.2d 996, 1003 (9th Cir. 1970)]. In that case the court noted: 'Both the applicable provisions of the Act [RLA] 45 U.S.C. [§ 152, Eleventh —and the applicable provision of the National Labor Relations Act—29 U.S.C. § 158(a)(3)—] are for all purposes here, the same.' It appears, therefore, that the scope of *Ellis* will extend to cases under the NLRA.

We conclude, therefore, that the two statutes, (i.e., section 2, Eleventh and section 8(a)(3) phrased similarly and expressive of the same legislative purpose, should be given the same construction. The defendants appear to argue, though, that the Supreme Court in *Street, Allen,* and *Ellis* in its construction of section 2, Eleventh was so motived by a desire to avoid finding the statute

under review unconstitutional that it gave the statute a skewed or "tortured" construction. They posit that the same "grave" constitutional question perceived by the Supreme Court to exist in connection with the construction of section 2, Eleventh did not exist in connection with the construction of section 8(a)(3). It followed under the defendants' syllogism that, in their view, *Street*, *Allen*, and *Ellis* were not to be given weight in construing section 8(a)(3). We do not find either of the grounds for this syllogism of the defendants valid. First of all, we disagree that the Supreme Court gave section 2, Eleventh an "unreasonable" or skewed construction in order to avoid confronting the constitutional issue. In construing section 2, Eleventh, the Supreme Court in *Street* carefully canvassed the legislative record in order to ascertain the legislative purpose of the statute and, on the basis of that examination of legislative purpose, it reached what in its considered opinion was an "entirely reasonable" construction of the statute. 367 U.S. at 750. In view of the strength of this construction ("entirely reasonable"), we are not prepared to find the construction given section 2, Eleventh by Justice Brennan in *Street* to be "tortured," to use Professor Cantor's term. Cantor, *supra* note 2, at 72. We would be properly hesitant to brand a construction of a statute adopted by the Supreme Court in three cases to be "skewed"; we believe the construction adopted by the Supreme Court was, as that Court said, one which was the "entirely reasonable" construction of the statute based on both its language and its legislative history.

Defendants' second reason, as included in their syllogism, seems to be, however, that the Supreme Court could not be expected to nor would it be impelled to give section 8(a)(3), in an action involving that section, the same construction it had given section 2, Eleventh, in an action involving only that statute, because the Court would not have been confronted with the same "grave"

constitutional question in the case of a challenge to section 8(a)(3) as it was when section 2, Eleventh was challenged. The rationale for this position is said by defendants to be that section 2, Eleventh explicitly pre-empted all contrary state law whereas section 8(a)(3) is inapplicable in any state which has enacted a right-to-work law under section 14(b) of the Taft-Hartley Act.[24] We are unable to see the force of this argument when the question arises in a state such as Maryland which has no right-to-work law and to which section 14(b) has no application. So far as this case is concerned, arising as it does in Maryland, there is no difference between a section 8(a)(3) constitutional challenge and the section 2, Eleventh challenge in *Street*. Section 8(a)(3) is just as effective and all-inclusive so far as employees in Maryland covered by the NLRA are concerned, as section 2, Eleventh is with respect to railway employees employed in Maryland. In fact, the purpose of enacting section 14(b) was to prevent pre-emption of state law in those states which should exercise the right given them by section 14(b) to be exempt from the authorization of section 8(3)(3). *Oil, Chemical & Atomic Workers International Union v. Mobil Oil Corp.*, 426 U.S. at 417. When the employees in Maryland, whether employed on the railroad or in other industrial installations have no rights secured under section 14(b) of the NLRA and are subject to practically identical statutory restrictions and limitations under section 8(a)(3) and section 2, Eleventh, it seems inconceivable that the Supreme Court would, in construing the two statutes, offer protection to one group of such employees and deny it to others because of some action taken by another state in enacting a statute under section 14(b) to protect only that latter state's employees. Actually, it is interesting that in *Abood*, where the Supreme Court faced the constitutionality of the agency shop clause directly, because the Michigan statute ad-

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[24] 29 U.S.C. § 164(b) (1983).

dressed public employees, it adopted the very construction of section 2, Eleventh declared by it in *Street* as the limit of constitutional power in permitting the exaction of the dues-equivalent from an objecting employee under an agency contract executed by an exclusive bargaining representative under the authority of a state or federal statute. This, it seems to us, demonstrates that it matters not under what statute the claim arises, for the result is the same.

Defendants also seek to cite other differences between section 2, Eleventh and section 8(a)(3) which render it improper to construe the two statutes similarly. The first of these differences is that prior to the enactment of section 2, Eleventh, the RLA prohibited the union shop whereas section 8(a)(3) of the NLRA permitted the union shop prior to the amendment made to that section in 1947 by the Taft-Hartley Act. It escapes us how the language of the two Acts prior to the additions of the provisions in question could effect the construction to be given the later amendments, expressed in similar language and intended to effectuate the same legislative purpose. Next, defendants find substantial differences because section 2, Eleventh allows union shop charges "for periodic dues, initiation fees, and assessments" and section 8(a)(3) uses the language "periodic dues and the initiation fees." When we consider the definition which the Supreme Court gave the term "assessment" in section 2, Eleventh of the Railway Labor Act, we perceive no reason to make any distinction between the two Acts so far as the issue involved in this case is concerned. Thus, in *Hanson*, the Court clearly stated that "[i]f 'assessments' are in fact imposed for purposes not germane to collective bargaining," they would be subject to the same restraints on use as would "dues." 351 U.S. at 235. In short, "assessments" add nothing to "dues" so far as an ability of the union to use either for "purposes not germane to collective bargaining." Fi-

nally, defendants find some significance in the fact that, during the development of section 8(a)(3), there was some discussion of placing a limit on "dues" or "initiation fees," but Congress determined ultimately not to do so, whereas in the later adoption of section 2, Eleventh the legislative history is silent on this point. The fact that in the legislative history of the earlier statute (section 8(a)(3)) there had been discussion of placing a dues limit in the statute, but Congress ultimately determined not to include or limit, whereas Congress, during the discussion preceding the later enactment of section 2, Eleventh never mentioned the subject of a limit on dues but followed the earlier statute in omitting such a limit, lacks any logical meaning to us. The addition of a specific limit on "dues" in the statute had been resolved when section 8(a)(3) was adopted. Unless Congress wished to depart from its view as adopted in 1947 in the consideration of section 8(a)(3), there was no point in reopening the matter when later Congress was considering enacting a similar statute for railway workers in section 2, Eleventh.

As their final thrust at the statutory claim of plaintiffs, defendants assert that plaintiffs' action, if sustainable, is within the exclusive jurisdiction of the National Labor Relations Board and that plaintiffs are without any justiciable remedy for the redress of this violation of their rights. Defendants conceded in their affidavits and motions, however, that a portion of the dues collected from plaintiffs by them was and will be used to finance political activities. The conscious use of such funds by the unions on their authority as the exclusive bargaining representative under the agency contract negotiated by them with the employer is not only a violation of the statute itself but also a violation of defendants' duty of fair representation. In either case, the action would have been within the jurisdiction of the district court under 28 U.S.C. § 1337. In *Street*, the Supreme Court made it

clear that under the federal labor law "a union's status as exclusive bargaining representative carries with it the duty fairly and equitably to represent all employees of the craft or class, union and nonunion." 367 U.S. at 761. And this duty has been interpreted "to require a union to represent fairly all the members of the bargaining unit for which the union is the exclusive agent, and this obligation in turn has been interpreted to include a specific duty to the unit's nonunion employees to establish procedures that will make sure that the employees are not forced to pay for union activities other than those the union undertakes in its agency role." *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1191 (7th Cir. 1984).

Specifically, courts have held that the union, under its role of exclusive bargaining representative by virtue of the agency contract, violates this duty of fair representation by compelling payments of dues to be used for purposes "not germane to collective bargaining" unless the unions have established a rebate procedure that fully protects the nonassenting employees from illegal exactions. That defendants in this case have not established a rebate procedure that "adequately protected the nonmembers' right to avoid contributing to objectionable political purposes" is established by *Ellis. Champion v. California*, 738 F.2d 1082, 1086 (9th Cir. 1984), *cert. denied sub nom. Champion v. Deukmejian*, —— U.S. ——, 84 L.Ed.2d 367 (1985) (decided on the basis of *Ellis*). Under those circumstances, an action for violation of the duty of fair representation is not pre-empted by the National Labor Relations Act, for, as the Supreme Court said in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 299 (1971):

> Indeed, in *Vaca v. Sipes*, 386 U.S. 171 (1967), we held that an action seeking damages for injury

> inflicted by a breach of a union's duty of fair representation was judicially cognizable in any event, that is, even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective agreement.

This same thought was expressed in *Smith v. Local No. 25, Sheet Metal Workers International Association*, 500 F.2d 741, 746 (5th Cir. 1974):

> In our judgment, union conduct may be consistent with or even unrelated to the terms of a collective bargaining agreement and yet violative of the duty of fair representation.

Such was the ruling in *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1000 (9th Cir. 1970), and *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 411-12 (10th Cir. 1971).[25]

Jurisdiction over plaintiffs' statutory suit against defendant union under section 8(a)(3) and for breach of the duty of fair representation was properly invoked under 28 U.S.C. § 1337. Section 1337 provides, in pertinent part, that "[t]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce." The Supreme Court has held that the NLRA is an Act of Congress regulating commerce, *see Capital Services, Inc. v. NLRB*, 347 U.S. 501, 504 (1954), and a suit for the protection of rights protected by section 8(a)(3) and under the union's duty of fair representation is one arising under the NLRA, *see William E. Arnold Co. v. Car-*

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[25] On remand, the court in *Reid* found that the union had given proper protection by its rebate provision and therefore held that the union had not violated its duty of fair representation. *Reid v. International Union*, 479 F.2d 517, 520 (10th Cir. 1973). The correctness of this decision must be doubtful after *Ellis* in which the Supreme Court disapproved a similar rebate procedure.

penters District Council, 417 U.S. 12, 16 (1974); *NLRB v. Heyman*, 541 F.2d 796, 799 (9th Cir. 1976); *Anderson v. United Paperworkers International Union*, 641 F.2d 574, 576 (8th Cir. 1981); *Smith v. Local No. 25, Sheet Metal Workers International Association*, 500 F.2d 741, 748-749 (5th Cir. 1974); *Nedd v. United Mine Workers*, 400 F.2d 103, 106 (3rd Cir. 1968). *See also Storey v. Local 327, International Board of Teamsters*, No. 83-5747, slip op. at 11-13 (6th Cir. Mar. 29, 1985). In the case *sub judice*, plaintiffs pled jurisdiction under section 1337 and challenged CWA's expenditures both under section 8(a)(3) as construed by the Supreme Court and as violative of its duty of fair representation. Consequently, the district court properly exercised jurisdiction over this matter.[26] In addition, were this not so, it is difficult to find jurisdiction in *Ellis*, which was filed initially in the federal district court, just as this case. That case was exactly like this case, save that it was brought under section 2, Eleventh and this one under section 8(a)(3). But, as we have seen, the two statutes are to be construed alike and both give to objecting employees the same rights. If there was jurisdiction under section 1337 over a statutory claim under section 2, Eleventh in *Ellis* (and that could be the only basis for jurisdiction in *Ellis* since the Supreme Court found it unnecessary to consider the constitutional claim), by the same token there is jurisdiction over the statutory claim

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[26] Because jurisdiction was properly invoked under § 1337, we need not decide whether jurisdiction exists under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185. However, in *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1000 (9th Cir. 1970), it was said that jurisdiction could be sustained under § 185 if the facts alleged or proved brought the action within the section. The undisputed facts in this case meet that test. *See Aguirre v. Automotive Teamsters*, 633 F.2d 168, 174 (9th Cir. 1980) ("'If facts giving the court jurisdiction are set forth in the complaint, the provision conferring jurisdiction need not be specifically pleaded'") (quoting *Williams v. United States*, 405 F.2d 951, 954 (9th Cir. 1969)); *Fristoe v. Reynolds Metal Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980).

under section 8(a)(3) here. In short, jurisdiction can only be denied in this case if jurisdiction is to be denied in *Ellis*.

Kolinske v. Lubbers, 712 F.2d 471, 481-82 (D.C.Cir. 1983), has been cited as contrary to jurisdiction in this case. *Kolinske*, on its facts, may well be said not to raise an issue within the union's duty of fair representation or violative of section 8(a)(3). The question there involved was the appellee's eligibility to receive strike benefits during a strike. These benefits were not created under the agency contract with the employer; neither did they have statutory authorization; they "were developed by the union *solely* as an ancillary, supportive tool of collective bargaining"; they by the terms of their creation "were made available to any employee, whether member or non-member, who contributed to the fund and in some way manifested a willingness to help the union's collective bargaining activities" (in this case the strike); and "[e]ligibility for benefits was conditioned in many ways, and payment was based on family size and length of a strike." *Id.* at 482 (emphasis added). The appellee's claim in that case related to the union's rules of eligibility for benefits from a union-developed and union-created fund. Such a case is one entirely involving union internal policies. In this case, however, the union's rights and obligations arise out of an agency contract authorized under a federal statute. Under that federally authorized contract, the union derives its right to collect a service charge from objecting employees. The rights of the union thus derive from an agreement, the content of which—so far as the collection of the dues-equivalent—is controlled by federal law as described by the Supreme Court. The source of the union's authority in this case is not certain rules developed and set by the internal procedures of the union; its right to the service charge and its obligation in the use of the dues-equivalent collected for that purpose stem from an agency contract

that exists only by virtue of federal law. A violation by the union of its duties under such contract, is a clear breach of section 8(a)(3) and of the union's duty of fair representation, intended to protect against discriminatory or arbitrary action by the union.

Since we are satisfied that there is jurisdiction of the statutory action under section 1337 on the authority of *Street*, *Allen*, and *Ellis*, it would seem unnecessary for us to consider the constitutional basis for jurisdiction. Lest it be thought that we agree with defendants' contention that there is no such basis for jurisdiction in this case, we address briefly that issue. We add that we are convinced that there is governmental action sufficient to sustain jurisdiction. The Supreme Court found jurisdiction of the constitutional right of action under section 2, Eleventh in *Hanson*, which involved "private employment" as does this case. 351 U.S. at 232. Further, the constitutional claim dealt with a statute which, as we have seen, was similar in language and legislative purpose to section 8(a)(3). As *Abood* emphasizes, "the union shop, as authorized by the Railway Labor Act, also was found to result from governmental action in *Hanson*. The plaintiffs' claims in *Hanson* failed, not because there was no governmental action, but because there was no First Amendment violation." 431 U.S. at 226. If we assume that section 2, Eleventh and section 8(a)(3) are to be given the same interpretation, then it necessarily follows under *Hanson* that there is governmental action here sufficient to satisfy the requirements for governmental action.[27] And defendants apparently recognize this, for they have argued at some length, as we have seen, that there is a substantive difference in the two statutes.

As we have said, no difference in the two statutes can be found either in their language or in their proclaimed legislative purpose. Defendants, however, purport to find

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[27] *See Blair, supra* note 23, at 194.

a difference in the fact that section 14(b) of the NLRA applies to exclusive representation cases under the NLRA, and not to such cases arising under the RLA. As we have said earlier, section 14(b) provides that section 8(a)(3) in its authorization of the agency shop will not apply in cases arising in a state which has banned agency shops. There is no similar provision in the RLA, for section 2, Eleventh states explicitly that it supersedes any state law. Repeating what we said earlier: we are unable to find that this difference has any relevance in the caes before us. This action arises in Maryland, a State which has no right-to-work statute. So far as an agency shop under section 8(a)(3) in Maryland is concerned, it stands the same as the similar agency shop under section 2, Eleventh of the RLA. Section 14(b) applies in neither of those cases; the controlling law in both cases is the federal statute. The court in *Linscott v. Millers Falls Co.*, 440 F.2d 14, 17 (1st Cir.) *cert. denied*, 404 U.S. 872 (1971), put the matter accurately: "By section 14(b)'s necessary implication, federal approval, and hence federal enforcement [under section 8(a)(3)] will exist in those states that do not enact such a law."

Defendants purport to find some substance for their argument in what they declare is the permissiveness in section 2(a)(3). Whether there is an authorized agency shop under section 8(a)(3) in any state depends, they argue, upon the will of the state, which, by enacting a section 14(b) statute, can prevent the execution of a valid agency contract over employment in the state. Governmental action which can exist only by the permission of the state will not do, they declare. Defendants overlook that an agency contract, whether under section 2, Eleventh or under section 8(a)(3), is by definition permissive. It depends on the agreement of both the employer and the bargaining agent; unless both give their permission, there can be no agency contract under either statute. This is the reason Justice Douglas in *Hanson*

said: "The union shop provision of the Railway Labor Act is only permissive." 351 U.S. at 231. Of course, there is no federal jurisdiction until the employer and the union choose to invoke the authorization granted under section 8(a)(3). To that point their rights may be termed "permissive." But when they actually invoke section 8(a)(3) and execute an agreement under the statute, the obligations cease to be "permissive" and become compelled under the statute.

Abood is also supportive of governmental action. It arose out of a state statute, applicable to state employees, which was similar in language to both section 8(a)(3) and section 2, Eleventh, except in one particular: it allowed the union enjoying the rights under an agency contract to collect dues which could be used for lobbying or political purposes. That statute had been enacted because states are exempt from the NLRA's provisions, just as states enacting right-to-work statutes are exempt. *See* 29 U.S.C. § 152(2). Certain state employees assailed the constitutionality of the provision allowing the use of their "dues" for political or lobbying purposes. The state trial court sustained the statute, finding the clause permitting use of the exacted funds did "not violate the Federal Constitution." 451 U.S. at 215. On appeal of the state intermediate appellate court's decision reversing and remanding the trial court, the Supreme Court reversed. The Court began by stating: "To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests . . . [and may] well be thought . . . to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." 431 U.S. at 222. The Court found, however, that, because of "the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress," a "service charge" may be collected to such extent as it is

used to finance "expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment" but not for political or lobbying purposes. *Id.* at 222, 225-226. It then addressed the question whether there is a difference between public and private employees in this area and dismissd the claim with this significant statement: "The differences between public and private-sector collective bargaining simply do not translate into differences in First Amendment rights." *Id.* at 232. It reiterated its construction of *Hanson*, as already quoted, to the effect that the union shop agreement authorized by the RLA was "found to result from governmental action." *Id.* at 226.

Governmental involvement and governmental action in this case, as *Abood* makes clear, is indisputable. The right of action herein has its roots in the national labor policy embodied in the NLRA and the Taft-Hartley Act and is a part of that legislated national labor policy, that, according to the opinion of the Supreme Court in *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967),

> extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all the employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . ." *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202 (1944).

That power of a union to exercise this compelling power as the exclusive bargaining representative of employees —both those approving and those objecting—in the unit stems from federal law. It is, as Justice Douglas said in *Hanson*, when referring to section 2, Eleventh, the "federal statute [which] is the source of the power and authority by which any private rights [of an objecting

employee] are lost or sacrificed. [citation omitted] The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." 351 U.S. at 232. And, in *Ellis*, the Supreme Court reiterated this same point. It said:

> Only a union that is certified [under federal law] as the exclusive bargaining agent is authorized to negotiate a contract requiring all employees to become members of or to make a contribution to the union. Until such a contract is executed, no dues or fees may be collected from objecting employees who are not members of the union; and by the same token, any obligatory payments required by a contract authorized by § 2, Eleventh terminate if the union ceases to be the exclusive bargaining agent. —— U.S. at ——, 80 L.Ed. 2d at 442.[28]

Again, as the Court in *Hanson* said, the "sanction of government" is "put behind" an agency contract, whether under section 2, Eleventh or under section 8(a)(3), executed by the exclusive bargaining agent. 351 U.S. at 232 n.4. Justice Douglas, who had written the opinion in

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[28] Since oral argument, counsel for defendants have cited to us *Price v. International Union*, No. H-84-1221, (D. Conn. Apr. 11, 1985). That case is similar to the one under review here. In *Price* the Court found that there was no "governmental action". Its rationale for this conclusion was:

> The union security clause contained in the contract among the defendants here is part of a privately bargained contract among private parties. That clause would be permissible if both state and federal law were silent about such clauses, and the existence of a permissive, but not compulsory federal statute which may be preempted by contrary state law does not establish that the federal government is the source of authority for the clause. Slip op. at 12-13.

This reasoning contradicts the holding in *Ellis*, —— U.S. at ——, 80 L.Ed.2d at 442, quoted above in the text (p. 47).

Hanson, made this point more emphatic in his dissent from the denial of certiorari, in which Chief Justice Burger concurred, in *Buckley v. American Federation of Television and Radio Artists*, 419 U.S. 1093, 1095 (1974):

> When Congress authorizes an employer and a union to enter into union-shop agreements binding and enforceable over the dissents of a minority of employees or union members, it has cast the weight of the Federal Government behind the agreements just as surely as if it has imposed them by statute.

If we were to follow the defendants' reasoning, what the government has done by authorizing the agency shop in section 2, Eleventh and section 8(a)(3) and compelling either union membership or the dues-equivalent contribution as a condition of employment is to vest the union with the right and authority to collect dues to be used for, among other purposes, the support of political candidates, policies, and political ideologies without any right existing in non-consenting employees to a judicial forum for the protection of their First Amendment rights or their rights under section 8(a)(3). Such authority as the union has in this case is grounded directly on the power given it as a result of its status as bargaining representative under the federal statute and under an agency contract that in turn owes its status to another federal statute. When that power—power to collect against the employee's will—to collect the dues-equivalent and to use those funds in a completely unconstitutional way (i.e., for political and lobbying purposes) is exercised by the union entirely under federal authorization, it seems impossible not to find in such union action governmental action. It is true, the actor is the union, but the union acts only under the warrant of federal authority. The union wears the cloak of the government; in making its demands it acts under authority vested in it by the federal government. As Jus-

tice Douglas said in his concurring opinion in *Street*: "Since neither Congress nor the state legislature can abridge [First Amendment] rights, they cannot grant the power to private groups to abridge them." 367 U.S. at 777. There is, in our opinion, governmental action.

In this case, the two-part test set forth in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) is fully satisfied. Unquestionably the deprivation in this case is "caused by the exercise of some right or privilege created by the State" and, since the statute clothes the union with the authority to exercise that power, the "conduct [of the union] is otherwise chargeable to the State." *Id.* at 937.

Defendants seek to find support for their contrary view in the recent cases of *Blum v. Yaretsky*, 457 U.S. 991 (1982) and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). *Blum* and *Rendell-Baker* both involved conduct by defendants which was clearly private. *Blum* involved a nursing home which was expected to meet certain regulatory requirements, but the transfer of patients, which was the subject of that action, was not within the regulations. In finding an absence of state action, the Court said: "[a] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." 457 U.S. at 1004. That language delineates perfectly the difference between this case and *Blum*.

Rendell-Baker involved the discharge of a teacher by a private school receiving its support largely from public funds. However, it was expressly agreed between the public bodies and the school that the latter was private and its employees were not "city employees." 457 U.S. at 833. The decision to discharge the plaintiff was "not compelled or even influenced by any state regulation."

Id. at 841. That is again quite different from this case where all acts taken were compelled by federal statute.

Defendants also cite *United Steelworkers v. Weber*, 443 U.S. 193 (1979) and *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982). In *Sadlowski*, the Supreme Court found the challenged conduct valid. In *Weber*, the employer and the union added to their collective bargaining agreement an affirmative action plan. Such addition was purely voluntary, based on no statutory or regulatory authorization. As the Court remarked, such a plan did not involve state action. 443 U.S. at 200. Neither of these cases adds any force to defendants' objection to our finding of governmental action and thus jurisdiction over the plaintiffs' clearly established constitutional claim. It follows that, in our opinion, governmental action [29] and thus jurisdiction would exist in this case over plaintiffs' constitutional claim.

Satisfied that there is jurisdiction present on both the statutory and constitutional claims of plaintiffs, we turn to the defendants' second claim of error in the decision of the district court.

The only remaining issue in this case is directed at determining what expenditures made by the union out of the dues-equivalent collected under an agency contract executed pursuant to section 8(a)(3) were permissible against objecting non-union employees such as plaintiffs.

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[29] *Compare Linscott v. Millers Falls Co.*, 440 F.2d 14, 17 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971), *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1000 (9th Cir. 1970), *Havas v. Communications Workers*, 509 F.Supp. 144, 148-149 (N.D.N.Y. 1981), and *Lykins v. Aluminum Workers Int'l Union*, 510 F.Supp. 21, 24-26 (E.D. Pa. 1980), *with Kolinske v. Lubbers*, 712 F.2d 471, 474-480 (D.C. Cir. 1983), *Hovan v. United Bd. of Carpenters and Joiners*, 704 F.2d 641, 642-645 (1st Cir. 1983), *Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 410-411 (10th Cir. 1971), *further proceedings*, 479 F.2d 517 (10th Cir.), *cert. denied*, 414 U.S. 1076 (1973), *and Price v. International Union*, No. H-84-1221, slip op. at 12-13 (D. Conn. Apr. 11, 1985).

The standard to be used in such determination was recently set forth by the Supreme Court in *Ellis*, by drawing upon and expanding upon the earlier decisions in *Street*, *Allen*, and *Abood*. *Ellis* said that objecting employees such as plaintiffs, from whom dues are collected and used under the agency contract, can only be charged for expenditures "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive reprensentative of the employees in dealing with the employer on labor-management issues." —— U.S. at ——, 80 L.Ed.2d at 442. Under this standard, the objecting employees "may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." *Id.* The objecting employees are entitled to a refund of any amount collected of them by the union beyond these "costs."

The burden of proof in establishing the charges validly chargeable under this standard against the objecting employees rests on defendant unions. This was settled by *Allen*, in which the Supreme Court said:

> Since the unions posses the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion. Absolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise. 373 U.S. at 122.

It is at this point in the analysis that the error claimed by defendants emerges. In determining whether the un-

ions met their burden, the special master applied the clear and convincing standard of proof, though the special master modified this somewhat by the language in *Allen* that absolute precision was neither expected nor required. Even as modified, though, this standard of proof conflicts with the standard set forth in *Ellis*, which is that of preponderance of the evidence. —— U.S. at —— n.15, 80 L.Ed.2d at 447 n.15.

Defendants' specific claim of error is that the special master used the improper standard of proof and that the district judge affirmed such use. It is clear that the special master erred in his standard of proof. However, it does not follow that all the conclusions of the special master, as affirmed by the district judge, must be vacated. Defendants identify no findings made by the special master and confirmed by the district judge which were made on the basis of this standard; they apparently would presume, however, nothing else appearing, that any finding of disputed fact was tainted by error due to the application of the incorrect standard. But, even accepting defendants' argument, it means that only those conclusions in which there was a dispute in the evidence are vulnerable to attack on the ground that the special master had weighed and resolved the facts by the use of an incorrect standard of proof. If the conclusion of the special master was one of law and required no evaluation of conflicts in evidence or if it was based on an absence of *any* evidence, the error in application of the incorrect standard of proof could not be said to have influenced the decision and would thus be harmless. Our problem, therefore, is to ascertain the findings or conclusions of the special master as confirmed by the district judge which may have been affected or influenced by the application of the incorrect standard of proof.

In doing this, however, we must recognize that there are two sets of defendants; one, CWA, the national union, and the other, the locals. The fee collected from

the employees under the agency contract was divided between the two on a 40-60% basis, respectively. The national and the local unions have made separate presentations and we must, therefore, deal separately with the expenditures of CWA and the locals. We shall begin with CWA's proof of expenditures.

CWA, through its expert witness, a certified public account, reviewed the expenditures made by CWA for the years in question and classified them under eight headings. The special master accepted the witness' listing of expenditures and the classifications within which he grouped these expenditures. He found no occasion in dealing with four of these classifications to inquire into the accuracy of the charges or the propriety of the classification. He did this because he found these groups to include charges impermissible against plaintiffs as a matter of law. He gave specific reasons in each instance for this disallowance. None of these reasons, we emphasize, represented a resolution of disputed facts but instead represented a determination that as a matter of law the expenditures were not chargeable to plaintiffs. We consider each of these disallowed categories of expenditures:

> (1) The first of these disallowed expenditures were those CWA itself classified as "political." It seems that CWA concedes the propriety of this disallowance. Had defendants not conceded the inadmissibility of these expenditures as charges against plaintiffs, *Street* would have compelled their disallowance.[30]

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[30] Professor Cantor has suggested that Congress in the Taft-Hartley Act banned the use of union fees in federal elections. Cantor *supra* note 2 at 72-76, 49 Notre Dame L. Rev. He argues that Congress thereby manifested its awareness of the problem and the fact that it did not include a similar prohibition in § 8(a)(3) of the Act indicates an intention by Congress not to prohibit such use in connection with that section. To sustain any

(2) The second category of expenditures found by the special master to be impermissible were "labor legislation" expenditures. This disallowance was based on two grounds: First, he found that in large part these expenditures covered costs of "lobbying efforts" by CWA "far remote . . . from collective bargaining, contract negotiation and grievance adjustment," for instance, "lobbying efforts on behalf of the adoption of the Panama Canal Treaty, and the Equal Rights Amendment." He suggested that there might have been some areas such as "the Telecommunications Act or Occupational Health and Safety Regulations" where "lobbying" would have some relevance, but the special master said CWA had made no effort to identify any such permissible "lobbying activities" or to offer any evidence in support. The disallowance seems justified under *Abood*.[31]

(3) "Community services" expenditures were also found inadmissible charges as a matter of law. In reaching that conclusion, the special master held that such expenditures did "not directly relate to, and are not reasonably necessary, in the opinion of the Special Master, for the proper effectuation of collective bargaining, contract administration and grievance adjustment." He added that First Amendment rights were involved in this situation because employees "may not approve of the particular charities

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such theory would be to reverse the decisions in *Street, Allen,* and *Abood.* We refuse the suggestion and choose to abide by the decision which the Supreme Court has reached in those cases dealing with § 2, Eleventh of the RLA which is similar to § 8(a)(3).

[31] In *Robinson v. New Jersey,* 741 F.2d 598 (3d Cir. 1984), the court appears to have sustained "lobbying" expenditures by public employees because of the unique relationship of public employees' working conditions, wages, etc. to legislation. It is not easy to reconcile this decision with *Abood.* However, we are not here concerned with public employees and the unique considerations which influenced the decision in *Robinson* are not present here.

receiving the largess of the Union" and the employees "may well have their own favorite charities . . . to which they may wish to contribute the portion of their agency fee payments allocated by the Union to charitable contributions." The disallowance seems to accord with the test stated in *Ellis*.[32]

(4) Finally, the special master disallowed what CWA identified as expenditures for "organizing." Incidentally, this is the only specifically disallowed class of expenditures which CWA claimed to be erroneous in its exceptions to the special master's report. However, *Ellis* held that such expenditures were not allowable charges against the objecting employees because "such expenditures are outside Congress' authorization." —— U.S. at ——, 80 L.Ed.2d at 444. The Supreme Court gave a number of reasons supporting their decision. These began with the statement of the legislative purpose of the enabling legislation: "We remain convinced that Congress' essential justification for authorizing the union shop was the desire to eliminate free riders—employees in the bargaining unit on whose behalf the union was obliged to perform its statutory functions, but who refused to contribute to the costs thereof." *Id.* at ——, 80 L.Ed.2d at 441-442. The Court concluded with this comment: "Organizing money is spent on people who are not union members, and only in the most distant way works to the benefit of those already paying dues. Any freerider problem here . . . is a far cry from the free-rider problem with which

[32] The only justification offered by CWA before the special master for the allowance of these expenditures as charges against plaintiffs was that such expenditures "creat[ed] a favorable climate of public sympathy and support when collective bargaining time arrives and particularly when there is a strike." We agree with the special master and the district judge that, under the test stated in *Ellis*, such expenditures were not "reasonably necessary . . . for the proper effectuation" of collective bargaining.

Congress was concerned." *Id.* at ——, 80 L.Ed.2d at 445.

The error in the standard of proof had no connection with the findings and conclusions on the chargeability of expenditures in these four categories and cannot provide a justification for a reversal. We therefore affirm the decision of the district court in approving the special master's disallowance of CWA's expenditures under the following four classifications made by defendants' accountant: "political," "labor legislation," "community services," and "organizing." There were four other classifications of expenditures identified by CWA's expert. One of these, headed "administrative," was a catch-all, spread out over the other seven classifications on a proportionate basis, and appears to create no problem. The other classifications in the grouping of expenditures were disbursements for "collective bargaining," "grievances," and "contract administration" purposes. The expenditures in these areas were also listed and identified as to their particular purpose by CWA. Some items of expenditures included in these areas were disallowed by the special master. Thus, he disallowed all expenditures listed under the heading of "Foreign Affairs." CWA had other expenditures identified for the purpose of "Defense Funds." Included in such expenditures was a substantial contribution to the United Mine Workers in support of their strike. This expenditure was disallowed by the special master. CWA had a grouping of expenditures in an area titled by it as "Publicity and Public Relations," which the president of CWA, according to the special master, classified as "Organizing." On that basis the special master disallowed the expenditures under this grouping. We agree with the special master's rulings on these disallowed items, as approved by the district judge. Their disallowance was made on the ground that such expenditures did not qualify for allowance under the rule as enunciated by the Supreme Court in *Ellis*. Such deci-

sions by the special master could not have involved in any way the erroneous standard for evaluating disputed questions of fact and are affirmed.

The other expenditures listed under the broad classifications of "collective bargaining," "grievance," and "contract administration," included various items such as "Convention and Related Committees," "Development and Research," "Professional Fees," and "Education." The differences between the special master and CWA did not concern the propriety of the titles. Unlike the situation in connection with the four classifications first discussed, where the items were disallowed as not admissible charges as a matter of law, it seemed that expenditures under these headings were reviewed on their facts. Most of these expenditures consisted of personal services. CWA's auditor relied in his compilation of these cost items on the estimate given him in interviews by the employees involved. CWA also called as witnesses some of the individuals involved to substantiate the charges. These witnesses confirmed the estimates of their time devoted to collective bargaining matters of the units involved here as shown on the auditor's figures. On cross-examination, however, these witnesses described their allocations of time to such duties as merely "guesses" and these witnesses were less than firm in their testimony. Moreover, CWA's accountant likened the problem of making a proper allocation of the employees' work time devoted to collective bargaining, grievance, and contract administration as difficult as "making a frog fly." He was unwilling to certify the charges. There were quite a number of employees, whose time was in whole or in part charged to collective bargaining, who were never called and gave no testimony on the expenditures listed covering the time they devoted to such collective bargaining. Because of the showing made by CWA, these charges were largely disallowed by the special master. On the record before us, it is not possible to determine whether the special master, in reaching this conclusion, applied a

"clear and convincing" standard of proof. For that reason, the allocation as it relates to these three classifications ("collective bargaining", "grievance," and "contract administration"), except for those items included therein specially found by us earlier to be improper charges ("Foreign Affairs," "Publicity and Public Affairs," and a part of the "Defense Fund") must be remanded to the district court.

On remand, we would assume the district judge will recommit the cause to the special master. It is to be hoped, however, that it will not be necessary on remand to take any extensive evidence. After all, the relevant evidence is already in the record. The problem is one of weighing the evidence by the proper standard of proof. It should be possible for this to be done promptly based largely, if not entirely, on the testimony already taken and without any great delay. This case has been pending for six years; it is time for it to be concluded. The parties' legal rights have been settled and the amount of monetary judgment is not large. The parties should cooperate to expedite the further resolution of this action.

Our discussion has so far dealt with the liability of CWA itself. It remains to confront the same issues as they relate to the local unions. Here the problem is the dearth of any reliable record of expenditures. In the opinion of the special master, the records of but one local union were sufficiently complete to give any reliable picture of the local's expenditures and this was for only one year. The special master accepted the records of this one local as typical of all the locals. The special master said he was unable to identify more than two percent of the local's expenditures which would have been admissible charges against plaintiffs. The other expenditures appeared to him to be inadmissible, but, even if the local was given the benefit of every doubt, it would be impossible, in his opinion, to regard as permissible charges against plaintiffs any more than the amount of

permissible expenditures allowable in favor of CWA (i.e. nineteen percent).

Obviously, the special master was not using a "clear and convincing" standard of proof in weighing the testimony on expenditures by the local unions. The problem, however, is that the special master reached his conclusion basically on his findings made in connection with CWA's expenditures, and, since we have remanded for further review on those findings, it would seem to follow that we must, under the same terms, remand the issue of the liability of the local unions.

We now turn to plaintiffs' objections. Their first contention on appeal is that the permanent injunction granted by the district court is statutorily inadequate. The injunction allows CWA to charge plaintiffs the full amount of regular member dues subject to reduction by an amount an independent certified public accountant later determines to be non-retainable. The injunction also makes provision for an interest-bearing escrow account which shall contain twice the amount determined in the previous fiscal year to be non-retainable. Plaintiffs contend the injunction permits CWA to use their agency fees for improper purposes, contrary to the holding in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, —— U.S. at ——, 80 L.Ed.2d at 438-439. On the contrary, the permanent injunction here at issue complies with the mandate of *Ellis*. In *Ellis*, the Supreme Court stated that a pure rebate approach, which permits a union to collect from agency fee payors full union dues subject only to later reduction, is statutorily inadequate because:

> [T]he union obtains an involuntary loan for purposes to which the employee objects.
>
> The only justification for this union borrowing would be administrative convenience. But there are readily available alternatives, such as advance re-

> duction of dues and/or interest-bearing escrow accounts, that place only the slightest additional burden, if any, on the union. Given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily.

Id. at ——, 80 L.Ed.2d at 439. While striking down the pure rebate approach, the Court explicitly approved of an approach incorporating an interest-bearing escrow account, similar to the injunction formulated by the district court in the case *sub judice*. Under the injunction prescribed by the district court, CWA will be unable to "commit dissenters' funds to improper uses even temporarily" because the escrow account is not subject to CWA control. Consequently, the permanent injunction prescribed by the district court adequately protects plaintiffs' rights because CWA will derive no benefit from the amount determined to be nonretainable.[33] *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1197 (7th Cir. 1984).

Plaintiffs also contend that the permanent injunction is inadequate because it provides that only if an agency fee payor is successful in challenging the amount determined by an accountant to be non-retainable will the cost of the challenge be taxed to CWA. Plaintiffs contend that CWA should bear the cost of *any* challenge made to the amount determined to be non-retainable. In this respect, plaintiffs simply ask for too much. They have been granted an injunction prohibiting CWA from collecting amounts unrelated to CWA's duty to represent the em-

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[33] Plaintiffs further contend that only an advance reduction approach can adequately protect their statutory rights. This contention, however, is without merit, for the Supreme Court in *Ellis* expressly sanctioned either an advance reduction *or* an interest-bearing escrow account approach. Either approach is adequate, because each prevents a union from extracting a forced loan from non-consenting payors.

ployees in labor-management relations and it is clear that CWA will not benefit from amounts determined to be non-retainable. To burden CWA with the cost of any challenge to the non-retainable amount, however frivolous, would not only encourage meritless challenges but also unfairly burden the union's other dues-paying members. Plaintiffs' rights are adequately protected by reimbursement for the cost of a successful challenge to the non-retainable amount.

The judgment of the district court is accordingly

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

WINTER, Chief Judge, dissenting:

I dissent. Plaintiffs contend that use of their agency shop fees for purposes not directly related to collective bargaining, grievance adjustment, or contract administration violates both the first amendment and § 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a). I conclude that the statutory claim fails because § 8(a)(3) cannot fairly be read to impose such limits on a union's use of the fees its collects. I further conclude that the first amendment claim fails because the defendant unions' use of plaintiffs' fees does not constitute state action. I would therefore reverse and direct entry of judgment for the defendants based on plaintiffs' failure to state a claim upon which relief can be granted.

I. Statutory Claim

Plaintiffs argue that the unions' use of their agency shop fees violates an implied right under § 8(a)(3) of the NLRA "not to be required to pay money, over objection, for [the union's] expenses not directly related to collective bargaining, contract administration and griev-

ance processing." Brief for Appellee at 32. This construction of the statute finds no support in the express language of the statute. Section 8(a)(3) is part of the subsection listing employers' unfair labor practices;[1] plaintiffs read into the provision a limit on *unions*, the violation of which is *not* an unfair labor practice.[2] Nor

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[1] Subsection 8(a), as codified at 29 U.S.C. § 158(a), provides in pertinent part:

> (a) It shall be an unfair labor practice for an employer—
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> . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . .: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . .

Actions constituting "an unfair labor practice for a labor organization" are listed in subsection 8(b).

[2] If plaintiffs simply raised this § 8(a)(3) claim as an unfair labor practice then the National Labor Relations Board would have exclusive jurisdiction. *See* San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959). Plaintiffs have instead characterized the alleged violation of § 8(a)(3) for jurisdictional purposes as both a "Breach of Implied Conditions of Contract and Statute" and a breach of the statutory duty of fair representa-

does this construction find any explicit support in legislative comment on the meaning of the subsection. Plaintiffs nevertheless argue that their construction of § 8(a)(3) has the virtue of letting us avoid the state action question presented here. Before reaching a difficult constitutional question, they note, we must first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided. International Association of Machinists v. Street, 367 U.S. 740, 749 (1961).

I conclude that plaintiffs' proposed interpretation of § 8(a)(3) is not *fairly* possible, and that plaintiffs therefore have no statutory claim. Both the language of § 8(a)(3) and its legislative history show that Congress did not intend to limit the use of agency shop fees under the NLRA.[3] Further, the history and purpose of this provision differs from the history and purpose of the agency shop provision in the Railway Labor Act; thus the Railway Labor Act's limits on fee use should not be engrafted onto the NLRA's § 8(a)(3).

Congress enacted § 8(a)(3) as part of the National Labor Relations Act of 1935, 29 U.S.C. § 141 *et seq.* That Act permitted closed shop agreements—those requiring union membership as a precondition to employment—unless such agreements were prohibited by state law. *See* Colgate-Palmolive-Peet Co. v. National Labor Relations Board, 338 U.S. 355, 361 (1949). The Labor

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tion. Complaint at 18; Appellees' Supplemental Brief at 2-4. *See also* majority opinion, *ante* at 37-42. The proper interpretation of the NLRA, as shown *infra*, defeats plaintiffs' statutory claim, however stated; Congress simply did not intend to allow the external review of union expenditures that plaintiffs seek. *Cf.* Price v. International Union, U.A.W., No. H-84-1221, slip op. 15-18 (D. Conn. April 11, 1985) (complaint about union's use of agency shop fees would not support duty of fair representation claim).

[3] *See also* Cantor, Uses and Abuses of the Agency Shop, 49 Notre Dame L. Rev. 61, 72 ff. (1983).

Management Relations Act of 1947 (the Taft-Hartley Act) amended § 8(a)(3) to prohibit the closed shop. Section 8(a)(3), however, continued to permit agency shop agreements—those requiring all employees to pay the equivalent of dues—unless prohibited by state law.

In enacting the Taft-Hartley Act, Congress explicitly considered the union practice of spending dues and fees for various purposes not directly related to collective bargaining. One of the prominent witnesses at the congressional committee hearings, the movie director Cecil B. DeMille, testified on this issue, using the example of his own experiences:

> In my case the right of political freedom was invaded [by the union] when I was given the choice between working or paying a political assessment . . . Because I refused to pay a political assessment, I was deprived of the right to work.

Labor Relations Program: Hearings on S. 55 and S.J. Res. 22 Before the Committee on Labor and Public Welfare, 80th Cong., 1st Sess. 801, 797 (1947), *cited in* S. Rep. No. 105, 80th Cong., 1st Sess. 7 (1947). DeMille objected strenuously to such exactions. He suggested that permitting agancy show agreements would be sufficient to solve the "free rider" problem of employees benefiting from union activity without contributing to its cost. Such a provision, he urged, should "provide that the service charge must be fair and not excessive." He further urged that "[p]olitical assessments and improper levies should be absolutely banned in any case." *Id.* at 806.

Congress acknowledged the problem of the worker who "has been compelled to contribute to causes and candidates for public office to which he was opposed." H.R. Rep. No. 245, 80th Cong., 1st Sess. 4 (1947) ("House Report"). To remedy this problem the initial House bill proposed two solutions. First, the bill declared that "[m]embers of any labor organization shall have the

right to be free from *unreasonable* or discriminatory financial demands of such organization." H.R. 3020, 80th Cong., 1st Sess. § 7(b) (1947) (emphasis added). To implement this policy, the bill made it an unfair labor practice for a union

> to impose initiation fees in amounts in excess of $25 per member unless the Board shall find that initiation fees greater than that amount are reasonable under the circumstances; or to impose any dues or general or special assessments that are not uniform upon the same class of members, or are in excess of such *reasonable* amounts as the members thereof, whom such organization represents or seeks to represent as a representative under section 9, by a majority of those voting, after due notice to the membership, shall authorize . . .

H.R. 3020, 80th Cong., 1st Sess. § 8(c)(2) (1947) (emphasis added). The House Report suggested that "[w]hat is reasonable will depend upon the size of the organization, the wage rates of its members, the benefits it confers, the stability of membership and of employment in the trades and industries in which the members work and other relevant factors." House Report at 31.

Second, the bill amended the Federal Corrupt Practices Act to make it unlawful for a union "to make a contribution or expenditure in connection with" any political election, primary or political convention to select candidates. H.R. 3020, 80th Cong., 1st Sess. § 304(1947). This provision meant that unions could use direct contributions for election activities, but only if "the dues which [employees] pay into the union treasury are not used for such purpose." 93 Cong. Rec. 6440 (1947) (statement of Sen. Taft), *quoted in* United States v. CIO, 335 U.S. 106, 119 (1948).

The House bill's attempt to monitor the "reasonableness" of union fees was part of a general proposal to

enact a "bill of rights" to limit union power. *See* 93 Cong. Rec. 3581 (statement of Rep. MacKinnon). This proposal met with extensive criticism. The House Minority Report faulted the bill's attempt to subject unions "to an external control of purely internal functions which is without parallel when compared to any other form of voluntary association." The report noted in particular the "extreme restriction of the internal activities of the union" imposed by such provisions as "the regulation of initiation fees and dues." These restrictions, the Minority Report asserted, would be both unfair to unions and unworkable in practice:

> These regulatory measures are not an appropriate subject for Federal legislation. Attempts by the Board to secure these rights for employees and union members and to regulate these activities would be attempting the impossible, i.e., attempting a regulation of the infinite details involved in the internal functioning of thousands of tradeunions having millions of members. No standards are provided in the bill to guide the Board, and none exist in fact. *For years most of our State courts have carefully refrained from such interference* in the internal affairs of unions, *realizing both the encroachment on individual liberty* involved in thus attempting to regulate the inner functioning of voluntary associations *and the sheer impossibility of doing so effectively, wisely, and equitably.*

House Report at 76 (minority) (emphasis added). *See also* 93 Cong. Rec. 3586 (1947) (statement of Rep. Powell). Those opposing the "bill of rights" provisions, as these excerpts show, preferred a hands-off policy for both agencies and courts.

The provisions regulating the "reasonableness" of dues, § 7(b) and § 8(c)(2), did not survive in the bill agreed on by the Conference Committee. Instead, the final bill added § 8(b)(5), which made it an unfair labor practice

for unions to require initiation fees that the National Labor Relations Board "finds excessive or discriminatory under all the circumstances." 29 U.S.C. § 158(b)(5). The Senate conferees refused to agree to the House bill's "bill of rights" provisions,

> since they felt that it was unwise to authorize an agency of the Government to undertake such elaborate policing of the internal affairs of unions . . . without further study of the structure of unions. In the opinion of the Senate conferees the language [in § 8(a)(3)] which protected an employee from losing his job if a union expelled him for some reason other than nonpayment of dues and initiation fees, *uniformly required of all members*, was considered sufficient protection.

93 Cong. Rec. 6601 (1947) (statement of Sen. Taft) (emphasis added).[4]

Some congressmen still worried that even the new provision, § 8(b)(5), "would require the Board to determine whether union fees were excessive or discriminatory." 93 Cong. Rec. 6662 (1947) (statement of Sen. Murray). "For example," one senator suggested, "in determining whether a particular fee was excessive the Board may have to decide . . . whether expenditures authorized by the union such as donations to charity were proper." *Id.* at 6662. *See also id.* at 6655, 6673. Senator Taft, the sponsor of the bill, answered such comments with the observation that "[t]he express language of [§ 8(b)(5)] shows how unfounded such an argument is." The provision, he noted, "is limited to

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[4] Congress later did enact a "bill of rights" for employees, as part ot the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* *See* United Steelworkers of America v. Sadlowski, 457 U.S. 102, 109 (1982).

initiation fees and does not cover dues." [5] 93 Cong. Rec. 7001 (1947). The purpose of § 8(b)(5), as the conferees made clear, was simply to prevent unions from continuing their closed shop monopoly of certain trades by charging exorbitant initiation fees to new employees who were not already union members. *See* 93 Cong. Rec. 6601, 7001 (1947) (statements of Sen. Taft).

Of the proposed provisions governing the use of regular dues and fees, only § 304 survived in the final bill.[6]

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[5] Subsection 8(b), as codified at 29 U.S.C. § 158(b), provides in pertinent part:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> . . .
>
> (5) to require of employees covered by an agreement authorized under [§ 8(a)(3)] the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected . . . .

[6] Section 304 was codified as 18 U.S.C. § 610, and applied to all labor unions. By the time Congress amended the RLA in 1950, however, the provision had proven largely ineffective. The Supreme Court avoided holding § 304 unconstitutional only by giving it a very narrow construction. United States v. CIO, 335 U.S. 106 (1948). After this decision the government given constitutional doubts about the statute, brought almost no new indictments under § 304 until 1955, and in 1949 Senator Taft brought about the provision's repeal in the Senate (the House failed to take action on the bill). *See* Rauh, Legality of Union Political Expenditures, 34 S. Cal. L. Rev. 153, 158-59 (1961).

Congress repealed § 304 in 1976, replacing the provision with 2 U.S.C. § 441b, which prohibits the use of agency shop fees by labor organizations in connection with federal elections. 2 U.S.C. § 441b(b)(3). Plaintiffs have not pursued a claim here under this statute, which requires administrative proceedings for enforcement. *See* 2 U.S.C. § 437g(a).

This legislative history makes it clear that Congress explicitly delineated the types of union dues collection that it deemed impermissible: exorbitant initiation fees and fees spent for political elections. Congress went this far and no further; it excluded no other areas of expenditure from the union's power to collect dues under a union security agreement. And "[a]s a matter of statutory construction, the authorities appear uniform in holding that an explicit exclusion appearing in and specifically limited to one provision of a statute and not included in another provision of the same statute logically implies that the exclusion is inapplicable as to the latter provision." League to Save Lake Tahoe, Inc. v. Trounday, 598 F.2d 1164, 1171 (9 Cir.), *cert. denied*, 444 U.S. 943 (1979).

We cannot entertain a claim alleging a union's inappropriate use of funds without contradicting Congress' intent in the Taft-Hartley Act to avoid general external supervision of internal union matters. Those in Congress who opposed external supervision of union dues collection argued that it was invasive and impractical. Here the proceedings exemplify precisely the situation that Congress decided to avoid in defeating the amendment to supervise union dues collection. The proceedings for this single union have already required over 9 years, over 4,000 pages of testimony, over 3,000 documents, and over 50 motions filed in the district court. Two district judges, a special master, batteries of lawyers, and countless witnesses, stenographers and clerks have contributed their services to this project. Even now the accounting remains unfinished, as the majority has ordered a remand. This exhaustive inquest, into every jot and tittle of a union's finances and activities, is *not* what Congress intended in passing the Taft-Hartley Act.

The argument that § 8(a)(3) of the NLRA limits the use of agency shop fees relies heavily on the established interpretation of § 2, Eleventh of the Railway Labor Act

(RLA), 45 U.S.C § 152.[7] The Supreme Court has construed that provision to deny a union authority to spend dissenting employees' agency fees for purposes other than collective representation. *See Street*, 367 U.S. at 768-69; Ellis v. Brotherhood of Railway, Airline and Steamship Clerks, 80 L. Ed. 2d 428, 442 (1984). I do not agree that this interpretation of the RLA controls our interpretation of § 8(a)(3). "Even rough analogies [between the RLA and the NLRA] must be drawn circumspectly, with due regard for the many differences between the statutory schemes." Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969) (footnote omitted). Here, despite the similarity of certain phrases in the RLA's § 2, Eleventh and the NLRA's § 8(a)(3), careful comparison of the NLRA and the

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[7] Section 2, Eleventh is part of a list of general duties established by the RLA. As codified at 45 U.S.C. § 152, this section provides in pertinent part:

> Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

RLA shows that the two provisions differ in terms of language, legislative history, and statutory purpose. The settled interpretation of the RLA therefore does not bind us here.

Congress enacted § 2, Eleventh in 1950, when it amended the Railway Labor Act. The Railway Labor Act as amended in 1934, unlike the National Labor Relations Act of 1935, prohibited closed and union shop agreements. As the time of the 1934 amendments, railroad unions urged Congress not to prohibit all union security agreements in their industry. Only one of the standard unions, however, had any security agreements in its contracts at that time; the rest remained committed to the principle of voluntarism despite their support for allowing such agreements. *Street*, 367 U.S. at 750-51, 753 n.8. Given this "strong and long-standing tradition of voluntary unionism," and the opposition of some legislators to the union shop, Congress embraced a "policy of complete freedom of choice of employees to join or not to join a union." *Id.* at 750.

The RLA ban on union security agreements continued until 1950, when Congress amended the Act to authorize union shop agreements whether or not permitted by state law. In pressing for this amendment, the railroad unions argued that it was "essentially unfair for nonmembers to participate in the benefits of [labor unions' activities] without contributing anything to the cost." Railroad witnesses emphasized that their collective bargaining costs were higher than those for other industries, since the RLA's complex administrative machinery "requires expense which is not known to unions in outside industry." Hearings on H.R. 7789, House Committee on Interstate and Foreign Commerce, 81st Cong. 2d Sess. 10 (statement of George M. Harrison, spokesman for Railway Labor Executives' Association), *quoted in Street*, 367 U.S. at 761-62. "This argument was decisive with Congress." *Street*, 367 U. S. at 762.

The legislative history of the 1950 RLA amendment is ambiguous on the issue of limiting unions' use of agency shop fees. Indeed, as the Supreme Court has noted in Abood v. Detroit Board of Education, 431 U.S. 209, 232 (1977), its opinion in *Street* "embraced an interpretation of the Railway Labor Act not without its difficulties." Two congressional committee witnesses, both railroad company representatives, did complain that the proposed RLA amendments would place no limits on unions' use of dues. *See Ellis*, 80 L. Ed. 2d at 440 n.9; *Street*, 367 U.S. at 767 n.16. "That Congress enacted [§ 2, Eleventh] over these objections arguably indicates that it was willing to tolerate broad exactions from objecting employees." *Ellis*, 80 L. Ed. 2d at 440.

The Supreme Court in *Street* nevertheless read into § 2, Eleventh a limitation on the railroad unions' power to use agency shop fees. In doing so, the Court pointed out that § 2, Eleventh was revised to meet the objections that the RLA as amended would not adequately protect the free speech rights of dissenting employees. *Street*, 367 U.S. at 765-66. The railroad unions responded to the concerns voiced about such employees by suggesting the addition of a proviso to prevent job loss for "employees to whom membership was denied or terminated for any reason other than the failure to the employee to tender the periodic dues, fees, and assessmnts uniformly rquired as a condition of acquiring or retaining membership." Railway Labor Act Amendments: Hearings on H.R. 7789 Before the Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess. 247 ("House Hearings"), *quoted in Street*, 367 U.S. at 765. The union president presenting this proviso, the *Street* opinion notes, suggested that the revision "remedies the alleged abuses of compulsory union membership as claimed by the opposing witnesses, yet makes possible the elimination of the 'free rider' and the sharing of the burden of maintenance by all of the beneficiaries of union activ-

ity." House Hearings at 253, *quoted in Street*, 367 U.S. at 765-66 (statement of George M. Harrison). To this protective proviso Congress "affixed . . . limitations." *Street*, 367 U.S. at 766.

The Supreme Court discerned in these revisions of § 2, Eleventh a "congressional concern over possible impingements on the interests of individual dissenters from union policies." This legislative history convinced the Court that

> Congress did not completely abandon the policy of full freedom of choice embodied in the 1934 [Railway Labor] Act, but rather made inroads on it for the limited purpose of eliminating the problems created bythe "free rider." That policy survives in § 2, Eleventh in the safeguards intended to protect freedom of dissent.

Id. at 767. The Court has found that a union's use of compelled dues for purposes other than its collective bargaining duties does not serve the "limited purpose" of eliminating the free rider problem, and is therefore an unjustifiable inroad on the policy of full freedom of employee choice violating § 2, Eleventh. *See id.* at 768-69; *Ellis*, 80 L. Ed. 2d at 441-42.

The legislative history and purpose of the NLRA and Taft-Hartley Act do not permit the same interpretation of § 8(a)(3). First, the NLRA never embraced the 1934 RLA's policy of "complete freedom of choice of employees to join or not to join a union" that "survives in § 2, Eleventh." *Street*, 367 U.S. at 750, 767. Rather, the NLRA's policy has been to leave the question of union shop agreements to state law. Hence the settled interpretation of § 2, Eleventh—based on the underlying policy of the 1934 Railway Labor Act where the statute and legislative history are ambiguous—does not control interpretation of a provision in the NLRA, which does not share the 1934 Railway Labor Act's underlying policy.

If the legislative purposes behind § 8(a)(3) and § 2, Eleventh were identical, one would expect that the Supreme Court in *Street* would have looked to the NLRA for guidance in interpreting § 2, Eleventh. The *Street* opinion, however, does not significantly rely on or discuss either the NLRA or § 8(a)(3). Instead, it focuses on the distinctive features of the railroad industry and the Railway Labor Act in construing § 2, Eleventh.

Second, the Taft-Hartley Act's legislative history, unlike the RLA's, is unambigous on the issue of limiting the use of union shop fees. Congress explicitly considered the problem of unions using compelled fees when it enacted the Taft-Hartley Act in 1947. Its response was to prohibit union spending in the particularly sensitive area of federal elections. It explicitly rejected amendments requiring more thoroughgoing supervision of union shop fees, however, as unjustifiably intrusive and unmanageable. We should respect this Congressional intent in construing § 8(a)(3). "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." United States v. Locke, 53 U.S.L.W. 4433, 4437 (U.S. Apr. 1, 1985), quoting Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933).

I reject the argument that § 8(a)(3) and § 2, Eleventh may not properly be construed differently The argument is grounded on remarks made by a few congressmen during the enactment of the RLA. But these remarks are only general comments about the similarity of the Taft-Hartley union security provisions, rather than explicit comparisons of § 8(a)(3) with the provisions of the RLA. Plaintiffs quote Senator Taft as declaring during debate that the bill "inserts in the railway mediation law almost the exact provisions . . . of the Taft-Hartley law, so that the conditions regarding the union shop and the check-off are carried into the relations between railroad unions and railroads." In fact, Senator Taft commented:

> In effect, the bill inserts in the railway mediation law almost the exact provisions, *so far as they fit*, of the Taft-Hartley law . . .

93 Cong. Rec. —— (1950), *reprinted in* Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., Legislative History of the Railway Labor Act, as Amended (1926 through 1966) at 1134 (1974).

The conclusion that § 8(a)(3) and § 2, Eleventh are identical in purpose should not rest on such ambiguous comparisons. Indeed, comparing the language of § 8(a)(3) and § 2, Eleventh reveals several obvious differences. Section 8(a)(3) states what employers may do in making agency shop agreements; § 2, Eleventh states what employers and *unions* may do. Section 8(a)(3) prohibits employer discrimination against an employee if the employer has reasonable grounds for believing that an employee was denied union membershaip for an impermissable reason; § 2, Eleventh has no such explicit provision. Section 8(a)(3) allows termination for an employee's failure to pay "the periodic dues and the initiation fees" uniformly required from employees; § 2, Eleventh speaks instead of "periodic dues, initiation fees, and assessments (not including fines and penalties)." Section 8(a)(3) agency shop agreements may give employees 30 days to join the union); § 2, Eleventh provides for 60 days.

I also question placing much reliance on RLA legislative history to interpret a provision of the Taft-Hartley Act. It is better to focus on the history of the Act one is trying to interpret, rather than on a few remarks made during the debate on an entirely different bill. To me, the history of the Taft-Hartley Act itself is a surer guide to its meaning than general comments made years later, and I think that it supplies the answer to the issue of statutory construction that this case presents.

II. Constitutional Claim

Essential to plaintiffs' first amendment claim is a finding of state action.[8] "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government, federal or state." Hudgens v. NLRB, 424 U.S. 507, 513 (1976). Thus the challenged use of agency fees is subject to constitutional scrutiny only if it is conduct "fairly attributable" to state or federal government. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). Plaintiffs do not argue that this conduct is fairly attributable to state government, and do not persuade me that it is fairly attributable to the federal government.

Defendants' use of agency fees is not fairly attributable to the federal government because it fails to satisfy the Supreme Court's two-part standard for determining the existence of state action. Under this standard, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. Further, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.* at 937. These inquiries overlap to some extent, reflecting "the necessarily fact-bound inquiry" that confronts us. *Id.* at 939.

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[8] I do not think that defendants argue that federal courts lack jurisdiction of the plaintiffs' constitutional claim. Rather, they argue that, because the challenged union activity is not state action, plaintiffs have failed to state a cognizable claim. Thus defendants' belated motion to dismiss for lack of state action was brought under Fed. R. Civ. P. 12(b)(6) (failure to state a claim) rather than Rule 12(b)(1) (lack of jurisdiction). This was an appropriate way to raise the state action issue. *Cf.* Modaber v. Culpepper Memorial Hospital, Inc., 674 F.2d 1023 (4 Cir. 1982) (Russell, J.) (affirming dismissal for failure to state a claim because no state action).

The first step of the *Lugar* inquiry requires a determination of whether the alleged deprivation results from "the exercise of a right or privileges having its source in state authority." *Lugar*, 457 U.S. at 939. The agency shop agreement here, and the attendant use of the plaintiffs' compelled fees, do not result to any direct way from the exercise of such power. Nothing in the NLRA compels the adoption of an agency shop agreement; the Act simply provides that federal law does not "preclude" such an agreement between an employer and its employees' bargaining representative. 29 U.S.C. § 158(a)(3). Nor does the Act preempt contrary state law; it merely permits agency shop agreements where there is no state "right to work" law. 29 U.S.C. § 164(b). As the Senate Report on the original NLRA noted, "the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal." S. Rep. No. 573, 74th Cong., 1st Sess. 11-12 (1935), *quoted in* S. Rep. No. 105, 80th Cong., 1st Sess. 6 (1947); *see also* Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301, 308-10 (1949). The Taft-Hartley Act provided no significant encouragement to enter into union security agreements either, banning the closed shop and letting state law continue to determine the legality of the agency shop.

The NLRA's policy of neutrality regarding agency shop agreements does not make entering into such an agreement an exercise of a government-created right. "[I]t is well settled that a state's mere authorization of private conduct does not justify a finding of state action." Kolinske v. Lubbers, 712 F.2d 471, 478 (D.C. Cir. 1983) (holding hat NLRA's agency shop provision does not satisfy either part of *Lugar* test); *see also* Price v. International Union, U.A.W., No. H-84-1221 (D. Conn. Apr. 11, 1985) (same).

The only right exercised here that can in any way be said to "cause" the alleged deprivation is the right of an

exclusive bargaining representative to make a collective agreement with an employer that is binding on all employees. The exercise of this exclusive bargaining power, it is true, "causes" the alleged deprivation in the limited sense that, but for such power, the union would be less likely to secure an agency shop agreement and thus plaintiffs' fees. This causal link, however, is too attenuated to attribute state action to defendants here, as the second part of the *Lugar* approach makes clear.

The second *Lugar* inquiry is whether an NLRA union can "fairly be said to be a state actor." "Something more" is required to convert a private party into a state actor than the exercise of statutory rights. *Cf.* Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (warehouseman's exercise of statutory right to sell goods on which storage charges not paid was not state action). Otherwise, "private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Lugar*, 457 U.S. at 937.

Monopoly status, which is what the right to be exclusive bargaining agent gives the union, is by itself insufficient to make a private party's acts state action. This issue was settled in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). The Supreme Court there held that government-conferred monopoly power alone was insufficient to establish state action in the context of a due process claim against an electrical utility. *Id.* at 351-52. The Court refused to find state action in suits against state-created monopolists where "there was insuffiicent relationship between the challenged actions of the entities involved and their monopoly status." *Id.* at 352.

The majority sees in the unions' monopoly status a nexus with the challenged actions sufficient to justify a finding of state action. It notes in particular the Supreme Court's recognition of the extent of union power in Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 202

(1944): "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body . . . ." *See ante* at p. 47. This was exactly the argument made by the plaintiffs in United Steelworkers of America v. Sadlowski, 457 U.S. 102 (1982), but rejected by the Court. There plaintiffs challenged a union rule prohibiting nonmember contributions in union elections as, *inter alia*, state action violating the first amendment. The plaintiffs pointed to the monopoly power conferred on unions over a given employer's job market. They argued, also citing *Steele*, that because of its exclusive bargaining power the union was "clothed with power not unlike that of a legislature which is subject to constitutional limitations . . . ." Brief for Respondent Sadlowski at 48; *see also* Reply Brief for Petitioner Steelworkers at 9. The Court dismissed this argument in a footnote for lack of state action. *Sadlowski* at 121 n.16.

The existence of federal contract enforcement machinery in the NLRA is also insufficient to transform a union's activity into state action. Thus the Supreme Court detected no state action in United Steelworkers of America v. Weber, 443 U.S. 193 (1979). There plaintiffs challenged an enforceable collective bargaining agreement providing for affirmative action hiring. Before addressing plaintiffs' Title VII challenge, the Court stated that the challenged plan "does not involve state action." *Id.* at 200, *cited in Sadlowski* at 121 n.16; *see also* American Communications Association v. Douds, 339 U.S. 382, 402 (1950) ("We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become Government agencies or may be regulated as such.")

The lack of a sufficient nexus here between the government's involvement and the private party's challenged actions parallels the situation in Rendell-Baker v. Kohn, 457 U.S. 830 (1982).[9] There the Supreme Court rejected

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[9] For further discussion comparing *Rendel-Baker* to the union situation, see *Kolinske*, 712 F.2d at 479-80.

the argument that extensive government regulation and 90% subsidization of a private school for problem students made the school a state actor. Several employees claimed that firing them for criticizing school policy violated the First Amendment. The Court refused to find state action, even though the state's continuing support of the school enabled it to limit the free speech of a certain portion of the labor force (teachers at the school). In finding no state action, the Court pointed to the interposed conduct of a private party exercising independent judgment; this judgment, rather than the government's involvement, yielded the challenged action. *Id.* at 839-42.

Here the independent judgment of employees, employers, and unions separates the potential for union monopoly bargaining power conferred by the federal government from the alleged free speech deprivation. I do not think that *Rendell-Baker* can be distinquished on the ground that the instant case is one in which the parties act under the compulsion of federal law. Federal legislation has not compelled the establishment of unions, nor has it compelled or even encouraged the adoption of agency shop agreements, as shown above. Indeed, the NLRA does not compel the acceptance of any collective bargaining terms. *See* 29 U.S.C. § 158(d). Rather, the employees, employers, and unions make these choices.

The NLRA differs in its general policy of neutrality regarding agency shop agreements from the Railway Labor Act. This case is therefore distinguishable from Railway Employees Dept. v. Hanson, 351 U.S. 225 (1956), which is asserted to compel a finding of state action in this case. There the Supreme Court found in the RLA the "something more" required to convert a union into a state actor. In that case plaintiffs sued to enjoin enforcement of a union security agreement in Nebraska, where a right-to-work law prohibited labor agreements from requiring union membership. The Court found governmental action because the RLA preempted

the state right-to-work law, and thus permitted the challenged union shop provision:

> If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded . . . In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed . . . .

Id. at 232. Because of the RLA's federal preemption, the Court concluded, "[a] union agreement made pursuant to the Railway Labor Act has . . . the *imprimatur* of the federal law upon it . . . ." *Id.* at 232 (emphasis added).

The basis for finding government action in *Hanson*—the federal imprimatur, or mark of approval, on agency shop agreements that the Supreme Court discerned in the preemption of all contrary state law—is lacking in the NLRA. The Court noted this distinction in *Hanson* itself:

> The parallel provision in § 14(b) of the Taft-Hartley Act . . . makes the union shop agreement give way before a state law prohibiting it.

Id. at 232 n.5. It noted the distinction again in *Abood*, emphasizing that federal preemption was the basis for finding government action:

> Unlike § 14(b) of the National Labor Relations Act, 29 U.S.C. § 164(b), the Railway Labor Act preempts any attempt by a State to prohibit a union-shop agreement. Had it not been for that federal statute, the union-shop provision at issue in Hanson would have been invalidated under Nebraska law. *The Hanson Court accordingly reasoned that government action was present* . . . .

Abood, 431 U.S. at 218 n.12 (emphasis added).

Lacking the preemption provision, the NLRA places no federal imprimatur on agency shop clauses. State law

rather than federal law is "the source of power and authority for such agreements" under the NLRA. The rationale for finding federal government action in *Hanson*, then, does not support such a finding here. Most courts have therefore found that *Hanson* does not compel a finding of state action for an agency shop agreement made under the NLRA or an analogous state statute. *See Kolinske*, 712 F.2d 471, 476 (D.C. Cir. 1983); Reid v. McDonnell Douglas Corp., 443 F.2d 408, 410 (10 Cir. 1971) ("[w]hatever the wisdom of this reasoning for the Railway Labor Act, it has no applicability to the National Labor Relations Act"); Linscott v. Miller Falls Co., 440 F.2d 14 (1 Cir.) (Coffin, J., concurring in judgment), *cert. denied*, 404 U.S. 872 (1971); *Price*, No. H-84-1221, slip op. at 11 (D. Conn. April 11, 1985); Pasillas v. Agricultural Labor Relations Board, 202 Cal. Rptr. 739 (Cal. App. 1. Dist. 1984) (following *Kolinske* and *Reid* in finding *Hanson* not to control state action question for state labor law patterned after NLRA). *But see* Seay v. McDonnell Douglas Corporation, 427 F.2d that *Hanson* controls finding of state action in NLRA 996, 1003 (9 Cir. 1970) (assuming without discussion context); *Linscott, supra* (majority opinion).[10]

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[10] The majority protests that the preemption distinction emphasized by the Supreme Court in *Hanson* and *Abood* is irrelevant. The present case, it notes, arises in a state that does not prohibit agency shop clauses, so that agency shops are permitted in Maryland under both federal acts. "So far as an agency shop under section 8(a)(3) in Maryland is concerned, it stands the same as the similar agency shop under section 2, Eleventh of the RLA." Majority opinion, *ante* at 44. Maryland law and the NLRA, however, merely permit private parties to negotiate an agency shop agreement. Neither Maryland law nor the NLRA encourages or requires such a provision, and, as noted above, "it is well settled that a state's mere authorization of private conduct does not justify a finding of state action." *Kolinske*, 712 F.2d at 478. The RLA, on the other hand, encourages agency shop agreements by preempting all contrary state law, and thus mandates a finding of federal government action under *Hanson*. *Hanson's* holding is not limited to states with a prohibition against railway agency shop clauses

The other case asserted to be controlling is *Abood*. There employees challenged the agency shop clause in a public sector collective bargaining agreement. A state statute patterned on the NLRA authorized such a clause. The Court assumed that this public employment contract involved state action. It upheld the use of agency shop fees to support collective bargaining, but found the use of such fees for political activities unconstitutional.

Abood is distinguishable on the state action issue because it involved the state in the roles of both legislator and employer. *See also Kolinske*, 712 F.2d at 477 (holding *Abood* distinguishable). I do not read the statement in *Abood* that "differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights," 431 U.S. at 232, as meaning that the differences between public- and private-sector bargaining do not translate into differences for *state action* purposes. Indeed, the obvious difference for state action purposes is that in the private sector case the state may merely authorize a private agreement. In the public sector cases, the state not only authorizes the agreement in its role as legislator, but affirmatively enters into such an agreement in its role as employer.

The *Abood* opinion compared the public sector case with the earlier private sector RLA cases "simply because the existence of governmental action in both contexts requires analysis of the free expression question". *Id.* at 226 n.23. The comment that "differences between public- and private-sector bargaining simply do not translate into differences in First Amendment rights" was a response to the argument that the greater *extent* of government action in the public sector case required more extensive first amendment safeguards than the government

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on the books for the RLA to preempt, since the RLA also has prevented states that might otherwise have enacted such a prohibition from doing so.

action in the RLA cases. *See id.* ("Hanson nowhere suggested that the constitutional scrutiny of the union-shop agreement was watered down because the governmental action operated less directly than is true in a case such as the present one.") At the same time, the Court explicitly noted that "[n]othing in our opinion . . . indicates that private collective-bargaining agreements are, without more, subject to constitutional constraints." *Id.*

It is for these reasons that I would reverse the judgment of the district court and direct it to dismiss the complaint.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. M-76-839

HARRY E. BECK, JR., *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*

JUDGMENT

In accordance with the Memorandum and Order dated March 4, 1983 and the Memorandum of even date herewith, it is ORDERED and ADJUDGED:

1. That Judgment be, and is hereby, entered in favor of the plaintiffs and against the defendants in the following amounts plus interest:

Doris Ambrose	$341 + $102	= $443
Jacqueline Brandon	$341 + (−$81)	= $260
Rue Downey	$185 + 0	= $185
Kathleen Heil	$126 + 0	= $126
Clay Lutz	$185 + 0	= $185
Roland Merkle	$224 + 0	= $224
Doris Morrow	$104 + 0	= $104
Frances Phillips	$324 + $128	= $452
Lois Stallings	$324 + $627	= $951
Harry Swartz, Jr.	$328 + $91	= $419
John Hurley	$444 + $808	= $1252
Harriet Lipschultz	$442 + $648	= $1090
Barbara McGaughey	$87 + 0	= $87
Marion Northrop	$442 + $647	= $1089
Mary Anna Cox	$284 + $510	= $794
Ethel Merryman	$309 + $497	= $806
Vivian Reedy	$283 + $	= $283
Barbara Russell	$319 + $322	= $641

2. That Judgment is entered for the plaintiffs and against the defendants in the amount of $37,279.64 as reimbursement for the amount paid by the plaintiffs as compensation to the Special Master.

3. That the defendants shall pay costs.

4. That the CWA defendants, its officers, agents, and employees are permanently enjoined from retaining and from attempting to retain from the plaintiffs for the period April 1, 1983 to December 31, 1983, and for each fiscal year of CWA thereafter, the amount certified as non-retainable by an independent Certified Public Accountant commissioned by the CWA defendant who has used the system of recordkeeping and allocations designed by the experts of CWA as set forth on page 43 of the Supplemental Report of Special Master Wilson K. Barnes filed September 14, 1981 [hereinafter the "Supplemental Report"] after remedying certain defects and omissions set forth on pages 45 and 46 of the Supplement Report and subject to the additional provisions for monitoring set forth on pages 46 to 48 of that Supplemental Report. The plaintiffs through their counsel and an expert or experts selected by them shall have the right upon the issuance of such report to review the workpapers of the Certified Public Accountant and of the time recording and sampling expert who prepared the report, and who monitored the operation of the new system during the period involved. If, within 45 days from the date on which the plaintiffs have been granted access to those papers as above provided, counsel and the experts of the plaintiffs disagree with the methods used in the preparation of and the conclusions stated in the report, they shall file with the court a statement indicating the basis of such disagreement. If no such statement is filed, the CWA defendants on the 46th day after the issuance of the report shall pay to the plaintiffs the amount stated in the report. If such a statement is filed, the court on the papers or after such hear-

ing as the court may deem proper shall determine the non-retainable amount. The CWA defendants shall each fiscal year hold in an interest-bearing escrow account, a portion of the agency fees paid by each plaintiff equal to twice the amount determined in the previous fiscal year to be non-retainable pending the determination above set forth.

In the event that plaintiffs' review results in a determination that the amount initially certified as non-retainable by the independent Certified Public Accountant must be increased, the CWA defendants, as part of the monitoring expense for their new system, shall pay to the plaintiffs an amount of money representing the reasonable value of the services of counsel and the experts of the plaintiffs in connection with the review from time to time as above set forth. If the parties cannot agree upon the amount to be paid for such services, the plaintiffs may submit by motion the question of the amount of such reasonable compensation to the court for determination, which, after hearing the CWA defendants, will award a monetary judgment, if appropriate, to the plaintiffs for the amount determined by the court.

Dated at Baltimore, Maryland this 9th day of August, 1983.

/s/ James R. Miller, Jr.
JAMES A. MILLER, JR.
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. M-76-839

HARRY E. BECK, JR., *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*

MEMORANDUM

The plaintiffs have objected to what they consider to be two clerical errors in this court's Memorandum dated March 4, 1983. The first of these involves the calculation of impermissible expenditures. For the reasons stated in the March 4th Memorandum and for the reasons stated by the defendants in their response to the plaintiffs' motion, the court believes it employed the correct calculation.

The plaintiffs, defendants, and now the court all agree, however, that the initial calculation of rebates by the court should have indicated that it covered the period from January 1, 1976 to September 30, 1979, not from January 1, 1976 to August 18, 1980. The error will be compensated for in the computation of rebates for the second period which will begin from September 30, 1979.

The parties have stipulated to the amounts paid by the plaintiffs for the period from September 30, 1979, and the court will enter judgment for the plaintiffs for 79% of the fees paid for this period as well as the initial period. It will also award the plaintiffs the amount paid by them to compensate the Special Master.

All other costs should be sought by the procedures set forth in Rule 54, Fed. R. Civ. P., and the Local Rules of this court.

Finally, the parties have sought modification of the permanent injunction as drawn by the Special Master and approved by this court. The plaintiffs argue, once again, for material changes, some of which were rejected by this court and some of which were rejected by the Special Master previously. As this court indicated in its March 4, 1983 Memorandum, it believes the form of injunction drafted by the Special Master is appropriate. It has, however, considered the changes proposed by the defendants, and finding them to be minor, reasonable, and just, the cou. will incorporate them into the permanent injunction entered herein.

Judgment, including permanent injunctive relief, will be entered herein.

/s/ James R. Miller, Jr.
JAMES R. MILLER, JR.
United States District Judge

Dated: August 9, 1983.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil Action No. M-76-839

HARRY E. BECK, JR., *et al.*,
Plaintiffs

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
Defendants

MEMORANDUM AND ORDER

STATEMENT OF THE CASE

The complaint in this action was filed on June 4, 1976 by eighteen employees of various Maryland subsidiaries of the American Telephone and Telegraph Company (AT&T) and the Chesapeake and Potomac Telephone Company (C&P). The plaintiffs are employed under collective bargaining agreements between their employers and the Communication Workers of America (CWA). Under the contracts, CWA, CWA District II, and CWA Locals 2100, 2101, 2108 and 2110 are the exclusive representatives of the employees. Plaintiffs, while they have not sought to become members of CWA, are subject to the collective bargaining agreements which require that they pay to CWA, as a condition of employment, an amount equal to the periodic dues and assessments of the union.

The plaintiffs have alleged that their agency fees are, at least in part, used to support partisan political or ideological causes unrelated to collective bargaining. The plaintiffs have objected to such expenditures and to other non-collective bargaining expenditures, alleging a viola-

tion of their First Amendment right to express themselves without governmental control and without prior governmental restraint.

On March 16, 1979, the late C. Stanley Blair, a judge of this court, held that the plaintiff agency fee payors were entitled to a declaratory judgment that the requirement of the payment by them of fees to finance activities other than "collective bargaining, contract administration and grievance adjustment," was improper. The judgment order referred the case to a special master for determination of "the percentage of the defendant's budget dispersed for purposes other than the three permissible ones." (Paper No. 71). The judgment included provisions (1) that if the parties were unable to agree upon a master, the court would appoint one; (2) that if the parties were unable to agree on an equitable allocation of the cost of reference, the court would direct the master to make a recommendation; (3) that once the percentage of the defendant's budget dispersed for impermissible purposes had been determined, the plaintiffs would be entitled to a refund of the excess paid by the plaintiffs for the period since January 1, 1976; and (4) that the judgment was conditioned on the plaintiff's dismissal of the AFL-CIO and its named affiliates as defendants. The AFL-CIO and its named affiliates were dismissed, with prejudice, on March 30, 1979. The parties were not able to agree upon a master, and on May 3, 1979, Judge Blair entered an Order appointing Honorable Wilson K. Barnes as Special Master.

In his March 16, 1979 Memorandum and Order Judge Blair held as follows:

> "(1) Pursuant to the Agency Shop Clause in its collective bargaining agreement with plaintiffs' employees, the defendant, CWA, has collected and continues to collect from the plaintiff amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment;

(2) That such collection by the defendant violates the First Amendment rights of the plaintiffs."

(Paper No. 70). The Special Master, on reference, was ordered to make the following determination:

"The Special Master shall exercise those powers confererd by this Court and Rule 53 in making findings of fact and conclusions of law with respect to the amount of the agency fee paid by each of the named plaintiffs to the defendants since January 1, 1976 which is not allocable to (1) collective bargaining, (2) contract administration, (3) grievance adjustment, all in accordance with the conclusion of law heretofore reached by the undersigned judge in this proceeding."

(Paper No. 73).

On August 18, 1980, Special Master Barnes filed a written report (Paper No. 114), setting forth his findings of fact and conclusions of law in response to the referral order. The defendants subsequently filed a motion to recommit this matter to the Special Master pursuant to Rule 53(e). The motion was granted by the undersigned judge (Paper No. 130) on January 19, 1981.

The first issue resubmitted to the Special Master dealt with his findings relating to the obligations of the Local Unions. The court concluded:

"The Special Master's report, however, is devoid of any specific findings or conclusions regarding the activities of the Local Unions. Given the fact that the Local Unions retain 60% of the fees in question, the court finds that this matter should be referred back to the Special Master either for clarification or further findings concerning the Local Unions. If the findings of the present report were intended to encompass the defendant locals, the basis of that holding should be set forth. If, on the other hand, the

report relates only to the portion of the fees expended by defendant CWA, the Special Master should submit further findings on the following issues:

> (1) What portion of the fees paid were retained by the local union defendants, and what portion was paid over to defendant CWA;
>
> (2) What percentage of the fees retained by each local union defendant is attributable to permissible expenditures, as outlined by previous Order of this court."

Further testimony on those issues was not required by the court unless Judge Barnes, in his role as Special Master, deemed it appropriate.

The second issue before the Special Master on recommital involved his determination of future injunctive relief. The Special Master's original report contained the following recommendation:

> "The plaintiffs listed in Schedule F are entitled to a permanent injunction restraining CWA, its officers, agents and employees from charging or collecting and from attempting to charge or collect from the plaintiffs in excess of 19% of the amount of dues, assessments or other payments payable by the members of CWA, subject, however, to modification by the Court upon a proper motion by CWA for such modification and the establishment by CWA at the time of hearing on such a motion that amounts in excess of such 19% were properly chargeable in the future to plaintiffs as Agency Fee Payors."

The court granted the defendants' motion to recommit the matter to a Special Master to enable the defendants to present additional evidence designed to modify the percentage figure for future injunctive relief. Specifically, the defendants sought to "present evidence to

the Special Master of modified bookkeeping procedures which would enable the unions to establish more accurately the percentage of expenditures on collective bargaining, contract administration, and grievance adjustment." (Paper No. 130 at 6). The court held that "[t]he injunctive relief regarding future collection should, however, be more flexible," (Paper No. 130 at 6), than that proposed in the Special Master's original report.

On remand the Special Master was requested specifically to submit additional findings on the following issues:

> "(1) Do the unions' current record keeping policies in any way alter the factual finding previously submitted to the court?
>
> (2) If so, what method of computation would most accurately reflect the percentage of fees collected which are properly allocable to permissive activities?
>
> (3) In what manner, if at all, may this computation procedure be made self-executing in order to compensate for future changes in union policies?
>
> (4) How should the final injunction be framed in order to accomplish the objection (sic) set forth in this order and the prior ones in this action?"

(Paper No. 130 at 7).

Finally, the Special Master was required to clarify his original findings with respect to clerical errors. (Paper No. 130 at 8).

On re-reference the Special Master held a series of conferences and hearings on the questions submitted. Detailed briefs were prepared by both sides and discovery was reinstituted, resulting in over 800 additional pages of transcript. The plaintiffs introduced 2,296 exhibits;

the defendants introduced 17 and additionally introduced extensive expert reports on CWA's proposed record keeping and accounting systems.

Special Master Barnes submitted his supplementary report (Paper No. 180) on September 18, 1981. The parties filed their objections to the report (Paper Nos. 184-86) and the defendants filed motions for action on the supplementary report (Papers 196, 197, 201). The plaintiffs responded to these motions (Paper No. 203). Finally, the defendants filed for leave to file a motion for judgment (Paper No. 204) with supporting memoranda (Papers 207, 208). The plaintiffs have opposed that motion (Paper Nos. 205, 208) and the defendants have replied (Papers 206, 210). The court has considered the motions and memoranda of the parties and has concluded that an oral hearing on these matters is not necessary. Local Rule 6(E).

OBJECTIONS TO THE REPORT OF THE SPECIAL MASTER

A. *Application of the Original Report to the Local Unions*

With regard to the first issue re-submitted to the Special Master, *i.e.*, findings related to the obligations of the local unions, the local unions, but not the plaintiffs, have objected (Paper No. 186) to the supplemental report. They object on the ground that the supplemental report, like the original report, allegedly fails to make findings with respect to the local unions.

"In an action to be tried without a jury the court shall accept the Master's findings of fact unless clearly erroneous," Fed. R. Civ. P. 53(e)(2). Thus, the task of the district court here in reviewing the Special Master's findings of fact is essentially the same task as faces an appellate court reviewing the findings of fact of a district court. *See* 5A *Moore's Federal Practice*, ¶ 53.12[4]

at 53-117 & 119. (2d. ed. 1982). Findings based on oral testimony, based partially on the fact finders' evaluation of witnesses' demeanor and credibility, are entitled to greater deference than are findings based on documentary and other non-demeanor evidence. *Id.* at 53-119. This is particularly true in a case such as this, where the testimony of numerous experts was so crucial.

In his supplemental report, the Special Master has made explicit his intention in the original report that the calculations of applicable percentages of permissible and impermissible expenditures by CWA should be applied also to the four local unions. Furthermore, the Special Master has complied with the court's request that the basis of his holding relative to the local unions be made specific. In pages 2 through 4 of the supplemental report, he explained that the local unions had failed to meet their burden of proof with respect to allocation of costs and that only by evaluating the evidence in the light most favorable to them could the Special Master justify an allocation equal to that of the CWA. The local unions' objection that the Special Master's findings are not supported by evidence (Paper Nos. 186 and 196) is without merit for it was their burden to produce evidence which the Special Master expressly found they failed to do. Furthermore, although the local unions now argue the remedy applied to the CWA is impractical to apply to them because of their smaller staffs and responsibilities, they failed to pursue this matter before the Special Master on recommittal. This court cannot say that the Special Master's findings are clearly erroneous on this issue. Therefore, the Special Master's supplemental report with respect to the calculation of permissible expenditures by the local union will be affirmed to the same extent it is affirmed for the CWA.

B. *Organizational Fees*

Defendant CWA objects to the Special Master's finding that the expenses of organization are not permissible.

The defendant relies principally on *American Steel Foundries v. Tri-City Central Trades*, 257 U.S. 184, 209 (1921), in which the Court outlined the importance of organizational activities to a healthy union. It is not disputed that organizing is an important function of the unions, nor that these activities may indirectly benefit unions' collective bargaining positions. The evidence before the Special Master, however, failed to support the conclusion that the fees attributable to organizing were used to benefit collective bargaining *in this case*. This is not to say that with proper evidentiary support a different conclusion would not be reached on other facts. *See Ellis v. Brotherhood of Railway Clerks*, 685 F.2d 1065 (9th Cir. 1982); *Browne v. Milwaukee Board of School Directors*, (Wisconsin Employment Relations Commission, Dec. No. 18408 (Feb. 3, 1981).

C. *Burden of Proof*

The CWA contends that the Special Master erred in imposing on the defendants the burden of proving permissible expenditures by clear and convincing evidence. Their first argument is that the defendant's burden as imposed by *Brotherhood of Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), should merely be one of going forward with the evidence, not one of persuasion. In support of this argument they cite the Title VII case of *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The opinion of Judge Blair (Paper No. 70) leaves no doubt that the burden placed on the defendants was one of persuasion. For this reason alone, if for no other, the court believes the doctrine of the law of the case dictates that the burden not be shifted at this time. Additionally, *Burdine*, on which the defendants rely, was not decided at the time of Judge Blair's decision. In any event, *Burdine* involved a Title VII claim and no such claims have been raised here. This court does not agree with

the defendants' broad reading of *Burdine* which would apparently reassign to all plaintiffs in all phases of all actions the burden of proof. There is nothing in *Burdine* to justify its application beyond Title VII.

In addition, the defendant CWA argues that the Special Master erred in imposing a standard of "clear and convincing" evidence. Although this court agrees with the defendant and the Ninth Circuit, *Ellis v. Brotherhood of Railway Clerks, supra* at 1070, that the Special Master erred in relying on *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), to support his conclusion that the appropriate standard was "clear and convincing evidence," the court disagrees with the conclusion that it was error to apply the standard at all.

In *Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977), the Supreme Court cited *Buckley v. Valeo*, 424 U.S. 1 (1976), for the proposition that:

> "Contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because '[m]aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals,' the Court reasoned that limitations upon the freedom to contribute 'implicate fundamental First Amendment interest.' "

431 U.S. at 234 (*quoting* from *Buckley*; citations omitted).

The Court then concluded that there was no significant difference for First Amendment purposes between limiting a campaign contribution and compelling contribution.

> "The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of

> First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced. . . ."

431 U.S. at 234 through 235 (footnotes omitted).

What is significant is that the Supreme Court held the expenditure limitations at issue in *Buckley* to "the exacting scrutiny applicable to limitations on core First Amendment rights of political expression," 424 U.S. at 44-45. *See* 424 U.S. at 16. This was consistent with numerous prior decisions determining that prior restrains on First Amendment freedoms carry a heavy presumption against their validity. *See, e.g., Heller v. New York*, 413 U.S. 491 (1973); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Tetel Film Corp. v. Cusack*, 390 U.S. 139 (1968). Given the basic First Amendment freedoms at issue in this case and the solicitude with which the Supreme Court has protected them, the Special Master was justified in applying a "clear and convincing evidence" test in this action.

D. *Adverse Inferences*

The defendant CWA also objects to the adverse inferences drawn by the Special Master from the failure of the CWA to produce 30 employees of CWA to testify regarding their allocation of time to permissible projects. There is no contention here that the defendant could not produce the witnesses, and the Special Master found that the plaintiffs had produced evidence indicating that "most of the 30 employees mentioned . . . are presently engaged in activities which are not 'collective bargaining, contract administration, and grievance adjustment.'" (Paper No. 114 at 22). Thus, the adverse inference rule was correctly applied. *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939); *NLRB v. Chester Valley, Inc.*, 652 F.2d 263 (2nd Cir. 1981); *Blow v. Compagnie Maritime Belge*, 395 F.2d 74 (4th Cir. 1968).

The defendant CWA also contends that the Special Master drew impermissible adverse inferences from the failure of the CWA to maintain adequate time records as suggested in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), and Allen, *supra*. While it is true that the Special Master admonished the CWA for failing to keep its time record (Paper No. 118 at 23-24), his decision was, nevertheless, based, not on adverse inferences from the non-production of such records, but on the finding that without them CWA failed to meet its burden of proof, *id.* at 24.

E. *Miscalculations*

The Special Master determined that the dollar amounts of permissible expenditures for collective bargaining, contract administartion, and grievance adjustment, equaled $4,424,000 in a total expenditure of $29,240,000. Likewise, the Special Master determined expressly that $5,052,000 of the total administrative expenses of $8,065,000 were permissible (Paper No. 114, Appendix D), but a portion of these "permissible" administrative expenses were attributable to impermissible activities in the same proportion that all non-administrative permissible activites bore to non-administrative impermissible activities. (The point raised by the plaintiffs (Paper No. 203 at 27) is well taken. The administrative expenses of $5,052,000 characterized as "*permissible*" should have been termed "allocable" to reduce confusion.) Therefore, the Special Master applied the calculation formula supplied by Dr. Bean, an expert produced by CWA, to arrive at the percentage of the total expenditures which constituted permissible expenses and applied that percentage to the allocable administrative expenses to arrive at that part of $5,052,000 which was attributable to collective bargaining, grievance adjustment and contract administration. The total of permissible expenses for collective bargaining, grievance adjustment and contract administration, or $4,424,000, was divided by the total expendi-

ture excluding cost of administration. The Special Master determined that this produced a figure of approximately 24%. (This finding is clearly erroneous as this calculation properly gives a figure of approximately 21%.) Based on the Bean formula, the percentage of allocable administrative cost of $5,052,000 attributable to collective bargaining, grievance adjustment, and contract administration was 24% or $1,212,000. The administrative costs attributable to collective bargaining, grievance adjustment and contract administration thus equaled $1,212,000. This figure added to the costs of collective bargaining, grievance adjustment and contract administration equaled $5,636,000. The percentage of $5,636,000 to the total expenditure is approximately 19% which the Special Master held was the percentage of permissible costs.

Application of the Bean formula has not been shown to be clearly erroneous, but the mathematical computation has. The percentage of permissible non-administrative expenditures to the whole should have been 21%. Twenty-one percent of $5,052,000 is $1,060,920 producing a total of permissible expenditures of $6,112,920 which produces a percentage of permissible expenditures of 21% ($6,112,920 divided by $29,240,000). The total impermissible expenditure is, thus, 79% (100% minus 21%).

F. *Application of Calculation to Years Other Than 1978*

The plaintiffs argued on recommittal that the 19/81 percentages (now 21/79) could not be applied to any year other than 1978. The Special Master concluded, however, that Dr. Bean's assertion that 1978 was a typical year was credible (Paper No. 114 at 8 and 13). The plaintiffs have cited the court to no evidence rebutting this finding and, therefore, the court does not find it clearly erroneous.

G. *Injunctive Relief*

All parties object to the injunction as proposed by the Special Master. (Paper 182 at 51-52). The defendants' proposed modifications are premised on issues addressed previously and need not be repeated here as the court has rejected them for the reasons stated. The plaintiffs' primary objection is that the proposed injunction is too vague to fall within the clear and precise standards applicable to First Amendment issues. The scheme accepted by the Special Master is admittedly not precise and clear, but it does fit within the stated expectations of the Supreme Court in *Allen, supra* at 122, that "absolute precision in the calculation of [the proportion of political to total union expenditures] is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise." The Supreme Court's caveat is equally applicable in this constitutional challenge as it was in the statutory challenge before the *Allen* court.

The plaintiffs also take exception to the language of the Special Master which suggests how the defendants may meet their burden in the future. Such language is *dicta* and as such the court considers it, if erroneous, to be harmless.

H. *Costs Allocation*

The plaintiffs protest the allocation of 19% of the cost to them as prevailing parties. The court finds this protest well founded and pursuant to Rule 53(a), Fed. R. Civ. P., will direct that the defendants pay the entire amount of compensation of the Special Master.

I. *Clerical Errors*

There being no objection by any of the parties, the corrections of the two clerical errors noted in the court's Order of recommittal are adopted. (Paper No. 103 at 8).

CONCLUSION

The original report of the Special Master (Paper No. 114) as modified by the supplemental report of the Special Master (Paper No. 182) is adopted with the modifications expressed herein.

Judgment will be entered against the defendants and in favor of the plaintiffs for the agency fees paid from January 1, 1976 to August 18, 1980 in the following amounts:

Doris Ambrose	$340.89
Jacqueline S. Brandon	$340.89
Rue Downey	$184.86
Kathleen Heil	$126.40
Clay Lutz	$184.86
Roland Merkle	$224.36
Doris Morrow	$104.28
Frances Philips	$324.07
Lois Stallings	$324.07
Larry Swartz, Jr.	$328.26
John Hurley	$444.41
Harriet Lipschultz	$441.53
Barabara McGaughey	$ 86.90
Marion Northrop	$441.53
Mary Anna Cox	$283.63
Ethey Merryman	$308.50
Vivian Reedy	$282.82
Barbara Russell	$319.18

Judgment will also be entered for the plaintiffs listed above against the defendants for 79% of the agency fees paid for August 18, 1980 to March 31, 1983. By separate order, the plaintiffs will be required to submit affidavits setting forth the amount of agency fees paid during this period.

Judgment will also be entered in favor of the plaintiffs granting them permanent injunctive relief.

Judgment will be entered for plaintiffs against defendants for 100% of costs, including compensation of the

Special Master. Because the parties have to date each paid 50% of said compensation, the plaintiffs will be ordered to advise the court of the total compensation to enable the court to enter judgment for plaintiffs for the amount paid by them.

Accordingly, it is this 4th day of March, 1983, by the United States District Court for the District of Maryland, ORDERED:

(1) The plaintiffs shall submit affidavits setting forth the amount of agency fees paid from August 18, 1980 to March 31, 1983 within twenty (20) days of the date of this Order.

(2) The plaintiffs shall advise the court of the total compensation paid or owed the Special Master by them within twenty (20) days of the date of this Order.

(3) The Clerk shall mail a copy of this Memorandum and Order to counsel for the parties.

/s/ James R. Miller, Jr.
JAMES R. MILLER, JR.
United States District Judge

APPENDIX F

U.S. DISTRICT COURT
DISTRICT OF MARYLAND

No. M-76-839

BECK, *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*

January 19, 1981

MILLER, District Judge: —This action was filed by various non-union C & P Telephone Company employees to challenge the "agency fee" provision of CWA's contract with C & P. The "agency fee" provision requires that all non-union C & P employees contribute to CWA an amount equal to union dues in order to compensate for benefits which non-union employees receive as a result of union efforts. The plaintiffs allege that this provision violates their First Amendment rights in that portions of the fees collected are used for purposes other than collective bargaining, contract administration, and grievance adjustment.

On March 16, 1979, the late Honorable C. Stanley Blair entered an order in this case in which he held:

"(1) Pursuant to the agency shop clause in its collective bargaining agreement with plaintiff's employees, the defendant, CWA, has collected and continues to collect from the plaintiffs amounts beyond that allocable to col-

lective bargaining, contract administration and grievance adjustment;

(2) That such collection by the defendant violates the First Amendment rights of the plaintiffs,"

(Paper 70). This case was then referred to the Honorable Wilson K. Barnes, as Special Master, for a determination of the following:

"The Special Master shall exercise those powers conferred by this court and Rule 53 in making findings of fact and conclusions of law with respect to the amount of the agency fee paid by each of the named plaintiffs to fee paid by each of the named plaintiffs to the defendants since January 1, 1976 which is not allocable to (1) collective bargaining, (2) contract administration, and (3) grievance adjustment, all in accordance with the conclusion of law heretofore reached by the undersigned judge in this proceeding."

(Paper 73).

On August 18, 1980, Special Master Barnes filed a written report setting forth his findings of fact and conclusions of law in response to the referral order. (Paper 114). The defendants subsequently filed a motion to recommit this matter to the special master (Paper 118), which is presently pending before this court.

I. *Analysis of Defendants' Motion*

The defendants prpose that this matter be re-referenced to the Special Master, pursuant to Fed. R. Civ. P. 53(e), for the following purposes:

(1) To make a separate determination of the financial obligations of the Local union defendants to the plaintiffs.

(2) To determine amounts properly chargeable in the future by CWA, based upon the union's revised record-keeping procedures.

A. *Obligations of the Local Unions*

The defendants' principal basis for seeking an order referring this matter back to the Special Master is that the Special Master's report contains no specific findings or conclusions regarding the local unions. The defendants contend that the agency fees in question are initially paid to the defendant local unions which retain approximately 60% of the fees. The remaining 40% of the fees is paid over to the national union, CWA, by the locals.

In his report, Special Master Barnes concluded that "CWA has improperly charged the Agency Fee Payors 81% of the dues paid by them to CWA." (Paper 114, p. 39). The defendants contend that this finding relates only to that portion of the agency fee actually transmitted to CFA, i.e., approximately 40% of the total fee remitted. The defendants therefore seek a separate determination of the amount to be refunded out of the portions of the agency fees retained by the various local unions.

The plaintiffs contend that the Special Master's report implicitly holds that the 81%/19% ratio applies to all CWA units considered. The plaintiffs memorandum (Paper 121) goes on the summarize the testimony presented to the Special Master concerning the operation of the local unions. Based upon this information, the plaintiffs contend that the evidence presented justifies no greater charge against the plaintiffs than the 19% as determined in the special master's report.

[1] The Court has reviewed Special Master Barnes' report which contains a thorough and detailed analysis of defendant CWA's expenditures. The plaintiffs have proffered that the hearings before the Special Master took twenty-seven days, ten of which were devoted to testimony concerning the activities of the defendant local unions. Separate briefs were filed by defendant CWA and the defendant local unions. The Special Master's report, how-

ever, is devoid of any specific findings or conclusions regarding the activities of the local unions. Given the fact that the local unions retain 60% of the fees in question, the court finds that this matter should be referred back to the Special Master either for clarification or for further findings concerning the local unions. If the findings of the present report were intended to encompass the defendant locals, the basis of that holding should be set forth. If, on the other hand, the report relates only to the portion of the fees expended by defendant CWA, the special master should submit further findings on the following issues:

(1) What portion of the fees paid were retained by the local union defendants, and what portion was paid over to defendant CWA;

(2) What percentage of the fees retained by each local union defendant is attributable to permissible expenditures, as outlined by previous order of this court.

Further testimony on these issues is not required unless Special Master Barnes deems it appropriate.

B. *Determination of Future Injunctive Relief*

The defendants seeks a modification of the Special Master's proposed conclusion of law regarding injunctive relief. The Special Master's report contained the following recommendation:

"The plaintiffs listed in Schedule F are entitled to a permanent injunction restraning CWA, its officers, agents and employees from charging or collecting and from attempting to charge or collect from the plaintiffs in excess of 19% of the amount of dues, assessments or other payments payable by the members of CWA, subject, however, to modification by the Court upon a proper motion by CWA for such modification and the establishment by CWA at the time of hearing on such a motion that

amounts in excess of such 19% were properly chargeable in the future to the plaintiffs as Agency Fee Payors." The defendants propose that the court refer this matter back to the Special Master to enable them to produce evidence to modify the percentage figure for future injunctive relief.

In Judge Blair's order of March 16, 1979, the burden of proving the proportion of expenditures properly chargeable as an agency fee was placed on the union defendants. Within this framework, the Special Master disallowed many of defendant CWA's expenditures since the unions failed to meet their burden of showing that those expenses were attributable to collective bargaining, contract administration, or grievance adjustment activities. In many instances, expense items were wholly disallowed because the unions' record-keeping procedures failed to establish the portion of that expense which should be allocated to chargeable activities.[1] The defendants now seek to present evidence to the Special Master of modified bookkeeping procedures which would enable the unions to establish more accurately the percentage of expenditures on collective bargaining, contract administration, and grievance adjustment. The defendants argue that future injunctive relief should reflect this modified percentage figure.

Judge Blair's Order of March 16, 1979, succinctly set forth the relief to which the plaintiffs are entitled as follows:

"Thus it appears that the plaintiff agency fee payers are entitled to a declaratory judgment that exaction of fees for activities other than 'collective bargaining, contract administration and grievance adjustment' is im-

[1] As an example, staff salary expenses were disallowed since the union records failed to provide any basis for a reliable estimate of the portion of time the individual staff workers spent on collective bargaining, contract administration or grievance adjustment activities.

proper, a decree ordering restitution of the amounts improperly collected by the union in the past, and an injunction against future amounts authorized by the agency shop in excess of the amount necessary for the three enumerated purposes."

This case was referred to the Special Master for a specific findings of the percentage amounts improperly collected from the plaintiffs in the past. The injunctive relief regarding future collections should, however, be more flexible in order to accommodate possible changes in the unions' procedures. If at all possible, the final injunction should contain a self-executing procedure which will enable the allowable percentage figure to fluctuate in order to reflect current union spending policies. This procedure will avoid the necessity of locking the court into the role of overseeing the unions' activities on a permanent basis.

[2] Given the Special Master's familiarity with the detailed factual record in this case, the court believes that the issue of framing future injunctive relief will be handled most expeditiously if addressed in the first instance by the Special Master. On remand, therefore, the Special Master should submit additional findings on the following issues:

(1) Do the unions' current record-keeping policies in any way alter the factual findings previously submitted to the court?

(2) If so, what method of computation would most accurately reflect the percentage of fees collected which are properly allocable to permissible activties?

(3) In what manner, if at all, may this computation procedure be made self-executing in order to compensate for future changes in union policies?

(4) How should the final injunction be framed in order to accomplish the objection set forth in this order and the prior orders in this action?

The Special Master may hold additional evidentiary hearings limited to the issues raised in the above questions. The parties may also engage in additional discovery, in accordance with the rulings of the Special Master, limited strictly to these issues.

C. *Clerical Errors*

The defendants have noted two apparent clerical errors in the Special Master's report. In Appendix D, i.e., the list of administrative expenses which were held to be permissible, the $416,000 figure listed as "Development and Research" should have been labeled "Other Headquarters". Similarly, the $24,000 figure listed as "Professional Fees" should have been labeled "Staff Moves." (Refer to Appendix A-2). Since this matter is being referred back to the Special Master for other clarifications, it seems appropriate to ask that the Special Master also indicate whether these labeling errors in any way effect his findings in this case.[2]

II. *Conclusion*

It is ORDERED this 19th day of January, 1981, by the United States District Court for the District of Maryland as follows:

(1) Defendants' Motion to Recommit this Matter to the Special Master (Paper 118) is GRANTED;

(2) This action will be referred back to Special Master Wilson K. Barnes, pursuant to the provisions of Fed. R. Civ. P. 53(e);

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[2] The plaintiffs indicate that the parties agreed that the $146,000 figure, however labeled, is a permissible administrative expense. With regard to the $24,000 figure, the plaintiffs contend that the Special Master would have disallowed the figure had he considered it a deduction for "staff moves" rather than for "professional fees". This appears to be true if the defendants failed to establish that the moves were in any way related to or necessitated by activities connected with the three permissible purposes.

(3) Special Master Barnes shall file a supplemental report within ninety (90) days, in accordance with the opinions set forth in this Memorandum and Order;

(4) If the parties are unable to agree upon an equitable allocation of costs of the re-reference, the court will then direct the master to make findings of fact and recommendation with respect to the apportionment of costs as between the parties which the court may adopt.

(5) The Clerk shall mail a copy of this Memorandum and Order to the Special Master and counsel.

APPENDIX G

UNITED STATES DISTRICT COURT
D. MARYLAND

Civ. No. B-76-839

HARRY E. BECK, JR., *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), *et al.*,

March 16, 1979

MEMORANDUM AND ORDER

BLAIR, District Judge.

This is an action brought against the Communications Workers of America (CWA) by twenty individuals who pay "agency fees" to that union and its various Maryland locals. The complaint alleges, in essence, that the defendant union has collected and continues to collect from the plaintiffs monies in excess of the amount actually allocable to expenses incurred in connection with collective bargaining, contract administration and grievance adjustment in violation of plaintiffs' first amendment rights.

This court held by Memorandum and Order of January 12, 1979, 468 F. Supp. 87 (D. Md. 1979), that the plaintiffs would not be required to exhaust internal union procedures prior to seeking a judicial determination of their rights. The court also determined at that time that

the case was appropriate for declaratory judgment, but decided to confer informally with counsel prior to issuing its judgment. Since that time, the defendant has raised two issues which must be decided before judgment in the case may be entered.

The first is whether the plaintiffs have standing to challenge the CWA procedure at all, since, by their own admission, they never invoked the rebate procedure and, according to the defendant, several of them failed to direct formal letters of protest to the union prior to filing the complaint in this case.[1] This court finds that the plaintiffs do have standing to bring this action.

The requirement that objectors voice their protest was set out in *International Association of Machinists v. Street*, 367 U.S. 740, 774, 81 S.Ct. 1784, 1803, 6 L.Ed.2d 1141 (1961) in which the Court stated that relief in such a case "would properly be granted only to employees who have made known to the union officials that they do not desire their funds to be used for political causes to which they object." The Court enlarged upon this statement in *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Allen*, 373 U.S. 113, 119 n.6, 83 S.Ct. 1158, 1162, 10 L.Ed.2d 235 (1963), when it stated:

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[1] This court notes that the defendant has taken a somewhat ambivalent position throughout this litigation vis-a-vis the standing of the plaintiffs. CWA filed a serious motion to dismiss or in the alternative to stay the proceedings pending plaintiffs' exhaustion of the internal union rebate procedure, which was denied by Memorandum and Order of this court. January 12, 1979, 468 F.Supp. 87 (D.Md. 1979). In its motion, CWA asserted that several of the plaintiffs had invoked the procedure and should be required to exhaust, and that others who had not invoked the procedure should be dismissed for lack of standing. More recently, in its Motion for Reconsideration, etc. (*see* infra at 95) CWA states at 2, 4 that "[a]ll plaintiffs are considered to have invoked the procedure for all years since 1976."

> Respondents first made known their objection to the petitioners' political expenditures in their complaint filed in this action; however, this was early enough.

Thus, it is clear that the law does not require an affirmative demonstration of protest as a condition precedent to bringing suit. All that is required is that the individual dissenter make known his position so that, in fairness to the union, no one who does *not* object to the union's political expenditures is able to secure relief. *Street, supra,* 367 U.S. at 774, 81 S.Ct. 1784; *Allen, supra,* 373 U.S. at 119, 83 S.Ct. 1158. In the instant case, the plaintiffs unequivocally made known their protest by filing suit. As in *Allen, supra,* that is "early enough." Accordingly, defendant's motion to dismiss for lack of standing will be denied.

Second, CWA has recently moved this Court to reconsider its Memorandum and Order of January 12, 1979 or, in the alternative, to certify an interlocutory appeal under 28 U.S.C. § 1292(b). In its motion for reconsideration, the defendant relies upon *Reid v. United Auto Workers,* 479 F.2d 517 (10th Cir.), *cert. denied,* 414 U.S. 1076, 94 S.Ct. 572, 38 L.Ed.2d 483 (1973), and *Seay v. McDonnell Douglas Corp.,* 371 F. Supp. 754 (C.D. Cal. 1973), *aff'd in part, reversed in part,* 533 F.2d 1126 (9th Cir. 1976), and asserts that CWA's "Partisan Politics-Policy" (copy appended to January 12 Memorandum and Order, 468 F. Supp. at 92, is in every respect satisfactory and that the plaintiffs should be required to exhaust internal union remedies. The defendant union has not brought to the court's attention any material which was not previously considered in connection with the motion to dismiss or to stay pending exhaustion. This court considered carefully the applicability of both *Reid* and *Seay* but concluded that in this case, it would not be helpful to require the plaintiffs to invoke and exhaust the union's rebate procedure. The decision to grant or deny a stay is a discretionary one, 1 C.J.S. Actions § 133, and this

court is satisfied that the exercise of its discretion was sound. Since the defendant has cited no auhtority which the court has not long had before it, and for the reasons already stated, the motion to reconsider the Memorandum and Order of January 12, 1979 will be denied.

In the alternative, the defendant has moved this court to certify an interlocutory appeal under 28 U.S.C. § 1292(b). That section provides for such an appeal where an otherwise non-appealable order involves a controlling question of law as to which there is substantial ground for difference of opinion and which, if resolved, may materially advance the ultimate termination of the litigation. Section 1292(b), a narrow exception to the longstanding rule against piecemeal appeal, is limited to exceptional cases. *Milbert v. Bison Laboratories*, 260 F.2d 431, 433 (3d Cir. 1958); *Gottesman v. General Motors Corp.*, 268 F.2d 194, 196 (2d Cir. 1959). This court is not of the opinion that this is an issue which requires application of the statute: it involves neither a "controlling question of law," nor would an interlocutory appeal "materially advance the ultimate termination of [this] litigation."

The question decided by this court in its January 12, 1979 Memorandum and Order was whether, under the facts of the case, it should stay proceedings and require the plaintiffs to exhaust the internal union rebate procedure prior to seeking judicial determination of what proportion of their "agency fees" could properly be collected by the union. This court found guidance in the Supreme Court's remark that a stay in such a case is "not strictly required by any doctrine of exhaustion of remedies," *Abood v. Detroit Board of Education*, 431 U.S. 209, 242, 97 S.Ct. 1782, 1803, 52 L.Ed.2d 261 (1977), and determined, under facts peculiar to this case, that a stay would not promote resolution of this controversy. As noted above, the decision to deny the stay was within the discretion of the court. It involved more a question of

fact than one of law; it certainly did not call into issue a "controlling question of law as to which there is substantial ground for difference of opinion" as required by 28 U.S.C. § 1292(b). The language and spirit of the section indicate that a discretionary decision such as this one ought not be treated as a controlling question of law. *J. C. Trahan Drilling Contractor, Inc. v. Sterling*, 335 F.2d 65, 66-67 (5th Cir. 1964).

Second, and more important, it does not appear that an immediate appeal would promote the termination of the litigation. This court denied the requested stay for the express reason that it did not appear that exhaustion of the CWA rebate procedure would in any way move the case toward resolution. See Memorandum and Order of January 12, 1979, 468 F. Supp. at 91 (D.Md. 1979). The amount of time necessary for the series of judicial and intra-union hearings and appeals contemplated by the defendant's motion for certification under § 1292(b) would better be calculated in years rather than months, and, in all likelihood, at the end of it all, this court would be called upon to make the determination it is now prepared to make. *Cf., e.g., Gottesman, supra*, 268 F.2d at 197. Accordingly, the defendant's motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b) will be denied.

The above outstanding issues having been resolved, there remains for this court the task of declaring its judgment as to the rights and obligations of the parties. This case presents an actual controversy within the jurisdiction of this court and the appropriate pleadings have been filed; accordingly, declaratory judgment is proper. 28 U.S.C. § 2201.

It is clear that in both the private and the public sectors, workers who are not union members may be obliged to pay "agency fees" to the recognized labor union as a condition of employment when the union-management contract requires such payments. *NLRB v. General*

Motors Corp., 373 U.S. 734, 735, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963); *Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407, 409 and n.1, 96 S.Ct. 2140, 48 L.Ed.2d 736 (1976). It is equally clear that labor organizations may not collect and disburse such "agency fees" for purposes other than "collective bargaining, contract administration, and grievance adjustment" without seriously implicating the first amendment rights of free speech and association of fee payors who object. *Abood v. Detroit Board of Education*, 431 U.S. 209, 225-26, 232 and 235-36, 97 S.Ct. 1782, 1794, 52 L.Ed.2d 261 (1977).

In this case it is undisputed that the defendant union, CWA, has negotiated an "agency shop" clause with the plaintiffs' employers which allows the union to collect dues-equivalent payments from the plaintiffs. *See* Exhibits A-1 and A-2 to the Complaint. It is also clear that the plaintiffs object to the expenditure of their funds for purposes other than "collective bargaining, contract administration, and grievance adjustment." Finally, it is undisputed that CWA has spent and continues to spend an as yet undetermined fraction of its dues receipts and dues-equivalent agency receipts for purposes other than the three numerated ones.

Thus it appears that the plaintiff agency-fee payors are entitled to a declaratory judgment that exaction of fees for activities other than "collective bargaining, contract administration and grievance adjustment" is improper, a decree ordering restitution of the amounts improperly collected by the union in the past, and an injunction against future collection of amounts authorized by the agency shop clause in excess of the amount necessary for the three enumerated purposes. *Allen, supra*, 373 U.S. at 122, 83 S.Ct. 1158; *Street, supra* at 774, 81 S.Ct. 1784. This relief necessarily requires a determination of what proportion of the union's total expenditures is attributable to activities other than collecive bargain-

ing, contract administration and grievance adjustment. *Street, supra*, 367 U.S. at 775, 81 S.Ct. 1784; *Allen, supra* at 121, 83 S.Ct. 1158. The burden of proving such proportion rests upon the union, but "[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required," *Allen, supra* at 122, 83 S.Ct. at 1163.

Accordingly, it is the judgment of this court, to be set forth separately by the Clerk as required by Fed. R. Civ. P. 58, that:

(1) Pursuant to the agency shop clause in its collective bargaining agreement with plaintiffs' employers, the defendant, CWA, has collected and continues to collect from the plaintiffs amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment;

(2) That such collection by the defendant violates the first amendment rights of the plaintiffs;

(3) That the parties may agree upon the percentage of the defendant's budget disbursed for purposes other than the three permissible ones;

(4) That if, at the expiration of thirty (30) days from the date of this Order, the parties remain unable so to agree, then, pursuant to Fed.R.Civ.P. 53, the matter will be referred to a master of the parties' own choosing;

(5) That if, at the expiration of ten (10) days from that date, the parties are unable to agree upon a master, then this court will appoint a master;

(6) That in the event of reference to a master, of either the parties' or the court's choosing, if the parties are unable to agree upon an equitable allocation of the costs of the reference, then this court will direct the master to make findings of fact and recommendations with respect to the apportionment of costs as between the parties which the court may adopt;

7) That when it has been determined what portion of the agency fees the defendant has collected improperly, the defendant is to refund to each plaintiff for every year since January 1, 1976 an amount reflecting that portion of his dues-equivalent agency fees which was spent for purposes other than collective bargaining, contract administration and grievance adjustment; and

(8) The provisions of this Order are expressly conditioned upon the plaintiffs' dismissing the AFL-CIO and its named affiliates from this action, as counsel for the plaintiffs represented informally they would do upon entry of this Order.

It is SO ORDERED.

It is further ORDERED that:

(1) Defendant's motion to dismiss for lack of standing be, and the same hereby is, DENIED.

(2) Defendant's motion for reconsideration be, and the same hereby is, DENIED; and

(3) Defendant's motion to certify an interlocutory appeal under 28 U.S.C. § 1292(b) be, and the same hereby is, DENIED.

APPENDIX H

UNITED STATES DISTRICT COURT
D. MARYLAND

Civ. No. B-76-839

HARRY E. BECK, JR., *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), *et al.*

Jan. 12, 1979

MEMORANDUM AND ORDER

BLAIR, District Judge.

Plaintiffs, twenty individuals employed by various Maryland subsidiaries of American Telephone and Telegraph Company (AT&T) and the Chesapeake and Potomac Telephone Company (C&P) and subject to collective bargaining agreements between the employers and the defendant union, Communication Workers of America (CWA),[1] are not members of the defendant union or of any labor organization. They are "agency fee payors"; that is, they are required to pay to the union as a condition of employment an amount equal to periodic union dues and assessments, so that they do not share in benefits secured by collective bargaining without shar-

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[1] The plaintiffs' employers, AT&T and C&P, were also named originally as parties defendant. By Memorandum and Order of April 13, 1977, this court granted the employers' motions to dismiss. Accordingly, the Union (CWA) and its subsidiary locals and committees are the only remaining defendants and are hereafter referred to collectively as "defendant" or "Union" or "CWA."

ing the cost. This "agency shop" arrangement is not prohibited by Section 8(a)(3) of the Taft-Hartley Act, 29 U.S.C. § 158(a)(3) and has consistently been upheld by the United States Supreme Court. *NLRB v. General Motors Corp.*, 373 U.S. 734, 735, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963); *Oil Chemical & Atomic Workers International Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407, 409 and n.1, 96 S.Ct. 2140, 48 L.Ed.2d 736 (1976).[2]

The plaintiffs do not challenge the validity of the agency shop but bring this action seeking, *inter alia*, to enjoin enforcement of CWA's agency shop provision insofar as the fees collected from the plaintiffs are allegedly used for non-collective bargaining purposes. The plaintiffs allege in substance that their coerced contributions are used to support lobbying efforts and political campaigns which plaintiffs oppose in violation of plaintiffs' right under the first amendment to express themselves freely, and without prior restraint.[3]

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[2] Section 14(b) of the National Labor Relations Act permits the states individually to prohibit such union-security agreements. 29 U.S.C. § 164(b). *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 757, 83 S.Ct. 1461, 10 L.Ed.2d 678 (1963) and *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963), but Maryland has not seen fit to do so.

[3] The plaintiffs oppose, in fact, the expenditure of agency funds for *any* purposes not directly related to collective bargaining, not just those primarily political in nature. They oppose, for example, expenditures for union social functions, maintenance of strike benefit funds, and scholarship funds, *inter alia*. Complaint ' 16. While not denying that these expenditures may raise serious questions, for the purposes of this motion, it is sufficient to consider only the allegation that the Union is collecting and disbursing agency funds for political purposes which the plaintiffs oppose.

This court reserves for decision at a later date the question whether the Union may spend the plaintiffs' fees for any or all of the non-collective bargaining purposes complained of, noting that there does appear to be, in the decisions of the Supreme Court on the subject, a gray area between expenditures for "political

If the Union is, as alleged, spending fees exacted pursuant to the agency shop arrangement in support of ideological activities to which plaintiffs object, such expenditures would, of course, seriously implicate the plaintiffs' fundamental first amendment interests. *Abood v. Detroit Board of Education*, 431 U.S. 209, 234, 237, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) *and see Buckley v. Valeo*, 424 U.S. 1, 23, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). The United States Supreme Court has suggested that labor unions might avoid infringing the first amendment rights of dissenters by establishing internal procedures for determining what proportion of the union budget is allocated to political purposes and then refunding the proportionate amount and excusing dissenting agency-fee payors from "contributing" that amount in the future. *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Allen*, 373 U.S. 113, 122-23, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963); *International Association of Machinists v. Street*, 367 U.S. 740, 774-75, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961). *See also Abood, supra*, 431 U.S. at 237 n. 34, 240, and n. 41, 97 S.Ct. 1782. Such an internal procedure, the Court supposed, might avert prolonged and expensive litigation. *Allen, supra*, 373 U.S. at 123, 83 S.Ct. 1158.

Allen and the other decisions of the Supreme Court recommending the establishment of an internal union accounting procedure do not expound in detail upon the nature of the procedure required. *Street, supra*, 367

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purposes" which are clearly impermissible and expenditures for "collective bargaining, contract administration, and grievance adjustment," which are, of course, permissible. *Compare Internat'l Assn. of Machinists v. Street*, 367 U.S. 740, 774-75, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961) and *Bhd. of Ry. and S. S. Clerks, Freight Handlers, Express and Station Employees v. Allen*, 373 U.S. 113, 121, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963) *with Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 225-26 and 236 and n. 33, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977).

U.S. at 775, 81 S.Ct. 1784, states merely that the dissenting employee is entitled to recover an amount proportionate to the fraction of the union budget which is spent on political purposes, although the employee is not required to trace his fees through the union machinery. *Allen, supra*, 373 U.S. at 122, 83 S.Ct. 1158, established that the union which collects and disburses the agency fees bears the burden of determining the correct proportion:

> Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion.

373 U.S. at 122, 83 S.Ct. at 1163.

In *Abood, supra*, 431 U.S. 209, 240, 97 S.Ct. 1782, 52 L.Ed.2d 261, the Court did not enlarge upon the practical proposal described in *Allen*, but did note that the union in that case had adopted an *Allen*-type plan [4] during the pendency of the litigation. The Court remanded the case to the state court and in doing so suggested that

> [i]n view of the newly adopted Union internal remedy, it may be appropriate under Michigan law even if not strictly required by any doctrine of exhaustion of remedies, to defer further judicial proceedings pending the voluntary utilization by the parties of that internal remedy as a possible means of settling the dispute.

431 U.S. at 242, 97 S.Ct. at 1803. The Court, in a footnote, declined to express an opinion as to the constitutional sufficiency of the internal remedy, and noted that

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[4] The union procedure in *Abood* is described at 431 U.S. 240 n. 41, 97 S.Ct. 1782. The union initially calculates the proportion of political expenditures, but its determination is subject to review by an impartial board.

if the employees concluded, after having exhausted, that the internal procedure was deficient, they would then be entitled to a judicial consideration of the adequacy of the remedy. The defendant Union [5] in this case has instituted an internal rebate procedure and has moved to dismiss or in the alternative to stay [6] these proceedings pending plaintiffs' exhaustion of the internal union remedy.

The plaintiffs contend that they should not be required to exhaust the internal union remedy prior to resort to judicial consideration. They assert that, in the first instance, internal union procedures are not applicable to those who are not members and, in any event, the CWA procedure is insufficient in many respects to safeguard the plaintiffs' constitutional rights. It is apparently the plaintiffs' contention that, contrary to the clear mandate of *Allen*, the determination which expenditures are political and which are permissible should under no circumstances be left to the union. They urge

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[5] The procedure adopted by CWA is set out in a resolution of the Executive Board effective July 1, 1974, entitled "Partisan Politics—Policy," a copy of which is attached hereto as Appendix. The policy provides that any member or non-member covered by a union-security agreement who objects to "the expenditure of a portion of dues or agency fees for activities or causes primarily political in nature" is entitled to a refund. The Administrative Committee of the Executive Board determines the approximate proportion of dues or fees attributable to political activity. If the payor objects to the amount calculated by the Administrative Committee, he may appeal to the Executive Board of the Union. There is a further and final appeal to the Convention. There is no provision in the policy for review by an impartial body.

[6] The defendants moved to dismiss the claims of those plaintiffs who have not invoked the CWA rebate procedure and to stay proceedings with respect to those who have invoked it. There is a factual dispute as to whether any of the plaintiffs invoked the procedure. Since this court is of the opinion that exhaustion of the union remedy will not be required in this case as a condition precedent to litigation, it is unnecessary to determine which, if any, of the plaintiffs invoked the procedure.

that only an Article III court may decide an issue which goes to the plaintiffs' fundamental first amendment rights.

Since this court has determined that on the facts of this case, exhaustion will not be required, it is unnecessary to reach the numerous constitutional issues the plaintiffs raise. The defendants' request for a stay pending exhaustion will be denied solely for the reason that it appears from the record to date that exhaustion would not promote settlement of the disputes and would cause unnecessary delay.

Although the Supreme Court has, as noted, demonstrated a preference for internal union procedures as an alternative to costly litigation, *Allen, supra*, 373 U.S. at 123, 83 S.Ct. 1158, *Abood, supra*, 431 U.S. at 240, 97 S.Ct. 1782, it does not appear that a stay is "strictly required by any doctrine of exhaustion of remedies." *Id.* at 242, 97 S.Ct. at 1802. The Court in *Abood* counseled that exhaustion in that case might afford "a possible means of settling the dispute." [7]

A stay, generally speaking, is a matter of convenience, not of right, and may be granted or denied in the exercise of the sound discretion of the court. The grounds upon which a stay of proceedings may be granted or denied on the facts and circumstances in each particular case. *See generally* 1 C.J.S. Actions §§ 131-137. In this case, a stay pending exhaustion of the union rebate procedure would not be helpful in promoting the ultimate resolution of the controversy. It is extremely unlikely that exhaustion will substantially alter the positions of the parties. For one thing, it is not completely clear from the proceedings to date that the union's rebate is proce-

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[7] This court notes that, on remand, the Michigan Court of Appeals, for reasons of its own, did not require exhaustion as a condition precedent to litigation. *Ball v. City of Detroit*, 84 Mich.App. 383, 269 N.W.2d 607 (1978).

durally or substantially adequate. The plaintiffs will almost certainly be dissatisfied with the Union's determination of the amount of dues-equivalent payments to be refunded,[8] if for no other reason than that the CWA procedure, unlike the union's procedure in *Abood*, provides for no review by an impartial party. *See also, e.g.*, Plaintiffs' Offer of Proof, Court Paper No. 46, which details the numerous defects the plaintiff's expect to encounter in the rebate procedure. Since the court has already been called upon to determine the sufficiency of the rebate procedure, and not merely to review the calculations of an accountant, it appears that only delay will result from requiring the plaintiffs to negotiate all three levels of the CWA plan before challenging it. There may, of course, be cases in which exhaustion is appropriate, but this is not one of them.

Accordingly, for the reasons stated, defendant's motion to dismiss or in the alternative to stay these proceedings pending exhaustion of the internal union remedy will be denied.

The plaintiffs have moved for summary judgment on Count VI of the Complaint. This court seeks essentially a declaratory judgment that the defendants may not raise as an affirmative defense the fact that this litiga-

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[8] In this case, certain, if not all of the plaintiffs directed form letters to the Union protesting the expenditure of their funds for non-collective bargaining purposes. In at least three cases, the Union recipient, Mr. James R. Pizzano, understood the purpose of the letters to be to invoke the rebate provision of the "Partisan Politics—Policy." Accordingly, the Union's accountant was directed to determine what percentage of the dues receipts for the fiscal year ending in March 1976 was attributable to "political and legislative programs." The accountant determined that the correct percentage was 5.78%, yielding a per capita refund of $2.95. *See* Affidavit of James R. Pizzano, attached to Defendant's Motion to Dismiss. Court Paper No. 36. The plaintiffs have already asserted that the Union's arithmetic is incorrect (although they deny that they invoked the procedure).

tion is financed in whole or in part by the National Right to Work Legal Defense Foundation, in possible contravention of 29 U.S.C. § 411(a)(4) (1970). It is sufficient to note that over the two-year history of this litigation, no defendant has ever raised this defense. It follows that there is no ripe "case or controversy" on this point, and it would exceed this court's power to issue the prayed-for declaration. *United Public Workers of America v. Mitchell*, 330 U.S. 75, 89, 67 S.Ct. 556, 91 L.Ed. 754 (1947). Accordingly, plaintiffs' motion for summary judgment will be denied.

It is this 12th day of January, 1979, by the United States District Court for the District of Maryland, ORDERED:

1. That the defendant's motion to dismiss or in the alternative to stay these proceedings be, and the same hereby is, DENIED; and

2. That plaintiffs' motion for summary judgment as to Count VI of the Complaint be, and the same hereby is, DENIED.

APPENDIX

The following policy statement was read and discussed by the Board. It concerns members or non-members who may be covered by a collective bargaining agreement containing a "Union Shop" or "Agency Shop" provision and who may object to that portion of dues or agency fees which may be used for political activities.

PARTISAN POLITICS—POLICY

Effective *July* 1, 1974, the following policy is hereby established:

1. Any member or nonmember who is covered by a collective bargaining agreement containing a "Union Shop" or "Agency Shop" provision shall have the right to object to the expenditure of a portion of dues or agency fees for activities or causes primarily political in nature, and shall be entitled to the refund of a portion of such dues under the terms, conditions and procedures contained in this statement of policy.

2. The Administrative Committee of the Executive Board shall determine the appropriate annual proportion of dues or agency fees spent for activities or causes primarily political in nature as of March 31st of each year.

3. A member or nonmember may express objection to the Secretary-Treasurer of the Union by written notification by registered or certified mail. Such objection must be received by the Secretary-Treasurer (postmarked) during the first fourteen (14) days of Union membership or agency association or during fourteen (14) days following each anniversary of Union membership or agency association. Each such individual written objection will be only for the current year in which the objection is made. An objection may be continued from year to year by individual notifications, during each annual anniversary of

membership or agency association and the following fourteen (14) days.

4. If the member or nonmember is not satisfied with the allocation determination of the Administrative Committee of the Executive Board, there shall be a right of appeal to the Executive Board of the Union. Such an appeal must be made in writing to the President of the Union by certified or registered mail and must be made within thirty (30) days from the date of notification or publication of the Administrative Committee's determination.

5. If the member or nonmember does not accept the decision of the Executive Board, there shall be a right of appeal to the Convention. Such appeal must be postmarked within fifteen (15) days of receipt of the decision of the Executive Board. Such notificatio nshall be in writing to the President and shall be sent by registered or certified mail.

6. The portion of Union dues or agency fees to be refunded for policy purposes to an objector shall be based on the amount determined to be allocable by the Administrative Committee, or any amendment thereof on appeal. The rebate to the member or nonmember will be based on the annual dues received for the current year in which the objection is received.

Motion: Moved that the above statement be adopted.

Motion adopted
6/19/74

APPENDIX I

U.S. DISTRICT COURT
DISTRICT OF MARYLAND

No. B-76-839

BECK, *et al.*

v.

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), *et al.*

April 13, 1977

Motion for Reconsideration Denied May 25, 1977

C. STANLEY BLAIR, District Judge:—This is a civil action arising out of the allegedly improper expenditure of agency fees by the defendants unions. Also named as defendants are the plaintiffs' employers; the American Telephone and Telegraph Company (AT&T) and the Chesapeake and Potomac Telephone Company (C&P). AT&T and C&P have moved to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] Under the doctrine enunciated in Conley v. Gibson, 355 U.S. 41, 45-46, 41 LRRM 2089 (1957), all material allegations in the complaint are assumed to be true and the complaint will not be dismissed unless it appears that plaintiffs can prove no set of facts which will entitle them to relief.

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[1] Although a hearing on the motion has been requested, the court finds one unnecessary under Local Rule 6.

Plaintiffs are twenty Maryland citizens who are employees or either AT&T or C&P, and are subject to collective bargaining agreements negotiated between AT&T and C&P and the Communications Workers of America (C.W.A.) which is the exclusive bargaining representative. Plaintiffs are not union members, but pay agency fees to C.W.A. equivalent to union dues as part of an agency shop. The crux of the complaint is that the defendant unions have used the agency fees for illegal activities including, *inter alia*, political agitation, propaganda and lobbying, direct or indirect compaign contributions, salaries and other benefits to union officials, and benefits to union members such as insurance and medical plans, scholarship funds, and social and recreational funds. In the Fourth Claim for Relief, plaintiffs allege that AT&T and C&P have violated 29 U.S.C. § 158(a)(3) by permitting illegitimate disbursements of agency fees by the C.W.A. and that AT&T and C&P have violated 29 U.S.C. § 185 and breached implied conditions of the collective bargaining agreement. In the Fifth Claim for Relief, plaintiffs allege violations of 42 U.S.C. §§ 1983, 1985(3), and 1986. AT&T and C&P have moved that these counts, the only ones in which they are named as defendants, be dismissed and plaintiffs have filed an opposition.

Plaintiffs do not challenge the validity of the agency shop arrangement. See NLRB v. General Motors Corp., 373 U.S. 734, 53 LRRM 2313 (1963); Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 53 LRRM 2318 (1963); Seay v. McDonnell Douglas Corp., 533 F.2d 1126, 1128 n. 2, 92 LRRM 2063, 2064 (9th Cir. 1976). The agency shop arrangement and the complaint in this action are similar to that in International Ass'n of Machinists v. Street, 367 U.S. 740, 48 LRRM 2345 (1961) where the Court stated:

> [T]he union shop agreement itself is not unlawful . . . The appellees therefore remain obliged, as a

> condition of continued employment, to make the payments to the respective unions called for by the agreements. . . . [A]ppellees' grievance stems from the spending of their funds for purposes not authorized by the Act in the face of their objections, not from the enforcement of the union-shop agreement by the mere collection of funds.

367 U.S. at 771, 48 LRRM at 2356. Defendants cite Reid v. McDonnell Douglas Corp., 443 F.2d 408, 77 LRRM 2609 (10th Cir. 1971), in support of their motion to dismiss. In Reid, the Tenth Circuit upheld the dismissal of a similar complaint against an employer. 443 F.2d at 412-13, 77 LRRM at 2613. In their opposition to the motion to dismiss, plaintiffs argue that the Reid holding is inapposite because it

> is so absurd as to require no discussion. It amounts to sustaining the dismissal of the Complaint, either on the theory that recovery against the Company might be unlikely, or that the damage to be recovered against the Company would be small. Both propositions should be rejected out of hand. Scheuer v. Rhodes, 416 U.S. 232 (1974); Wolman v. Tose, 467 F.2d [29] (4th Cir. 1972); Allison v. California Adult Authority, 419 F.2d 822 (9th Cir. 1969); Asher v. Reliance Ins. Co., 308 F.Supp. 847 (N.D. Cal. 1970).

Initially the court notes that in Reid, as here, the alleged violation of the employees' rights occurred not because of the collection and transfer of agency fees by the employer, but because of union expenditure of these funds. Plaintiffs' grievance is with the unions, not with AT&T or C&P. In a similar case, Seay v. McDonnell Douglas Corp., 427 F.2d 996, 74 LRRM 2600 (9th Cir. 1970), the Ninth Circuit reversed the district court's dismissal on jurisdictional grounds of a class action against the corporation and the International Associa-

tion of Machinists and Aerospace Workers local. The court found that jurisdiction existed and instructed the district court that

> plaintiffs on remand should be permitted to amend to more clearly set out their claim and to state a cause of action against McDonnell Douglas if such is possible.

427 F.2d at 1004, 74 LRRM at 2607. On remand, the employer's motion to dismiss was once again granted. Seay v. McDonnell Douglas Corp., 371 F. Supp. 754, 756 n. 2, 85 LRRM 2007 (C.D.Cal. 1973). This dismissal was not appealed. Seay v. McDonnell Douglas Corp., 533 F.2d 1126, 1128 n. 1, 92 LRRM 2063, 2064 (9th Cir. 1976). Despite plaintiffs' assertion that the Reid holding should be "rejected out of hand," the best that can be said for the four cases cited by plaintiffs is that all are distinguishable and dismissal was inappropriate. The court finds that no claim has been alleged which will entitle plaintiffs to relief against AT&T and C&P on the Fourth Claim for Relief, and their motion to dismiss will be granted.

AT&T and C&P have moved to dismiss the claims under 42 U.S.C. § 1983 on the ground that the alleged acts are purely private in character and are without the requisite state action. Plaintiffs argue that sufficient governmental action exists because the agency shop arrangement is authorized under section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3). Plaintiffs attempt to equate the terms governmental action and state action in an effort to bring this suit within the "under color of law" requirement of section 1983 and cite Barrett v. United Hospital, 376 F.Supp. 791 n. 18 (S.D.N.Y. 1974), and McLellan v. Mississippi Power & Light Co., 526 F.2d 870 (5th Cir. 1976). Barrett involved the question of whether there was sufficient state involvement by a private nonprofit hospital to fall within the ambit of state action. Although the Barrett

court did make reference to federal and state involvement as governmental action, the discussion is only significant in the context of activities which are traditionally governmental functions. Barrett has no application to this case. If anything, McLellan supports the defendants' position rather than plaintiffs'. There the Fifth Circuit affirmed the dismissal of a section 1983 claim brought by a private corporate utility company because the utility's action did not fall within the purview of state action. Nothing suggests that the activities of AT&T or C&P are anything other than private and in the absence of state action plaintiffs' section 1983 claim against them will be dismissed.

AT&T and C&P have moved to dismiss plaintiffs' claims under 42 U.S.C. § 1985(3). Unlike section 1983 which requires "state action," section 1985(3) reaches purely private conspiracies whether or not the conspirators are acting under the color of state law. In Griffin v. Breckenridge, 403 U.S. 88, 9 FEP Cases 1196 (1971), the Supreme Court set out the elements of a cause of action under section 1985(3). They are: (1) the defendants must conspire, (2) for the purpose of directly or indirectly depriving a person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law, (3) acts by the defendants in furtherance of the object of the conspiracy whereby (4) another was injured in his person or property or deprived of having and exercising any right or privilege of a citizen of the United States. 403 U.S. at 102-3. Thus, if the object of the alleged conspiracy did not include a violation of law other than section 1985(3) the plaintiff would not be deprived of the protection of the laws. McLellan v. Mississippi Power & Light Co., 545 F.2d 919, 925 (5th Cir. 1977 (rehearing en banc). The allegations of the complaint in this case do not state a claim that AT&T and C&P conspired with anyone to act contrary to law. To the contrary, the allegations make it clear that the agency fees paid by the

plaintiffs were paid pursuant to a collective bargaining agreement lawfully entered into under the provisions of 29 U.S.C. § 158(a)(2).

The court finds Lohr v. Association of Catholic Teachers, Local 1776, 416 F.Supp. 619, 93 LRRM 2054 (E.D. Pa. 1976),[2] extremely persuasive on this question. Lohr involved almost identical claims to those here and the district court dismissed a section 1985(3) claim against the employer. The court's holding is equally appropriate to this action.

> In this case, the collective bargaining agreement is not *per se* illegal, and the allegation that the Archdiocese knew that the union impermissibly used the agency fees paid by the plaintiffs and therefore forced plaintiffs to pay more for statutory activities than [union] members, is not sufficient to state a claim that either the Archdiocese or its representatives is a member of an unlawful conspiracy. . . .

416 F.Supp. at 623, 93 LRRM at 2056. Defendants' motion to dismiss the section 1985(3) claim will be granted.

Having failed to state a claim under section 1985(3), plaintiff's derivative claim under section 1986 must be dismissed as well. Dowsey v. Wilkins, 467 F.2d 1022, 1026 (5th Cir. 1972); Lohr, 416 F.Supp. at 623, 93 LRRM at 2056.

Accordingly, it is this 13th day of April, 1977, ORDERED that defendants AT&T and C&P's motions to dismiss be, and hereby are GRANTED.

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[2] The court notes that plaintiffs' counsel failed to bring Lohr to the attention of the court, although counsel represented the plaintiffs in that action as well. While under no strict duty to do so, see ABA, Code of Professional Responsibility, EC 7-23, the court cannot look favorably upon such an omission in view of the relatively few cases on the question presented and the irrefutable fact that counsel knew of the Lohr decision.

MEMORANDUM AND ORDER

By Order dated April 13, 1977, the court granted the motions to dismiss of American Telephone & Telegraph and C & P Telephone Company. Plaintiffs have filed a motion for reconsideration or alternatively for certification pursuant to Federal Rule of Civil Procedure 54(b). Upon consideration of the authorities cited by plaintiffs and defendants, it is this 25th day of May, 1977, ORDERED that plaintiffs' motion for reconsideration of the court's April 13, 1977 Order and plaintiffs' motion for certification are DENIED.

The Clerk shall mail a copy of this Memorandum and Order to counsel for the parties.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. M-76-839

HARRY E. BECK, JR., *et al.*,
Plaintiffs

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
Defendants

SUPPLEMENTAL REPORT OF WILSON K. BARNES, SPECIAL MASTER

Order of Re-Reference to Special Master
Dated January 19, 1981

Report filed September 14, 1981

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. M-76-839

HARRY E. BECK, JR., *et al.*,
Plaintiffs

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
Defendants

SUPPLEMENTAL REPORT OF WILSON K. BARNES, SPECIAL MASTER

This Court, by its Order of May 3, 1979 appointed Wilson K. Barnes as Special Master with certain powers and duties as set forth in that Order. The Special Master filed his Report in accordance with the reference to him on August 18, 1980 (Original Report).

Thereafter, the Defendants, Communications Workers of America, Inc. (CWA), and various Local Unions filed a Motion in the District Court to recommit this matter to the Special Master and after hearing arguments of counsel and considering their briefs on the subject, the Court by its Order of January 19, 1981 granted the Motion of the Defendants to recommit for the purpose of making certain explanations, corrections and additional findings as set forth in the Order of January 19.

The Special Master has proceeded with a number of hearings in the recommitted matter, which included the taking of a substantial amount of testimony. Counsel for the respective parties have presented comprehensive and helpful briefs and memoranda on a variety of questions to the Special Master, including several discovery issues,

and have ably presented the positions of their respective clients.

The matters presented to the Special Master by the Order of January 19, 1981 will now be considered separately under appropriate headings.

1.

Local Unions' Expenditures and Allocations in the Original Report

The Special Master intended that the calculations of applicable percentages of permissible and impermissible expenditures by CWA should be applicable to and control the expenditures by the four Local Unions, i.e., Local 2100, Local 2101, Local 2108 and Local 2110, including, of course, the 60 percent of the fees in question retained by the Local Union Defendants. This is *implicit* in the calculations appearing in Appendix F attached to the Original Report. In retrospect, it would have been better if the Special Master had made his intention in this regard, *explicit* rather than to leave it to implication and the Special Master is happy to have the opportunity to make his intentions explicit in this Supplemental Report.

In the letter dated June 6, 1980 from Matthew A. Kane, Esquire, attorney for CWA and the Local Unions to the Special Master, attached hereto as "Supplemental Report Exhibit No. 1," enclosing a study of the "Classification of Local Expenditures" by the four Local Unions, attached hereto as "Supplemental Report Exhibit No. 2," Mr. Kane presented the basis factual data in regard to the position of the Defendants relating to these Local expenditures. Mr. Kane also presented to the Special Master the argument of the Defendants in a separate brief filed at the time of argument before the Special Master. These documents were carefully considered by

the Special Master prior to the submission by him of the Original Report.

It was the thought, however, of the Special Master that in view of the length and detailed findings in the Original Report in regard to the CWA expenditures *vel non*, and their allocation as permissible or impermissible, it would unduly expand the Original Report to inlcude a similar particularized study in regard to the Local expenditures, especially when the Special Master concluded that the same deficiencies in meeting the required burden of proof to establish expenditures made for the three permissible categories—collective bargaining, contract administration and grievance adjustment—applicable to the CWA expenditures were also applicable to the Local Union expenditures.

As the Special Master stated on page 7 of the Original Report:

> Inasmuch as the *Defendants* did not keep their books of account upon any theory of separation of items or amounts upon this basis, the *Defendants* have been presented with a most difficult task in meeting this burden of proof. (emphasis supplied.)

It was further stated on page 7 of the Original Report that:

> In view of the constitutional issues involved, the burden of proof requires that the *Defendants* prevail, if at all, upon "clear and convincing evidence. . . ." (emphasis supplied.)

In examining the testimony and exhibits in regard to the Local Union expenditures, the Special Master found and now finds that the best, although legally inadequate, presentation of cost figures was on behalf of Local 2101. Here, at least, Local 2101 attempted contemporaneously to accumulate costs by activity and percentage, so that using the Local 2101 testimony and exhibits as character-

istic of the expenditures of all our Local Unions would be to their advantage and entirely fair to them.

It should be kept in mind that so far as collective bargaining is concerned, the important functions in regard to it are largely performed at the national level by CWA, rather than at the Local level by the four Local Unions.

The expenditures of Local 2101 for grievance adjustment are minimal, being less than 2 percent of all annual expenditures. See Exhibits 16A through C for the years 1978, 1977 and 1976.

One of the substantial items of expenditure by Local 2101 is the salary of its President, Alfred J. Moran. But like a similar situation in regard to salary allocation in CWA, Local 2101 presented no figures which could substantiate a proper allocation. See Moran Transcript of October 31, 1971, page 165, and indeed, President Moran characterizes his attempted allocations as a "guesstimate" and indicated his time spent on contract administration and grievance adjustment was speculation stating that it was "35 percent—40 percent—maybe 50 percent" (Moran Transcript, pages 158 and 165) or that it "*might* be lower than 35 percent" or "as high as 75 percent" (Moran Transcript, page 181). (emphasis supplied.)

President Moran's testimony also indicated that much of the activity of Local 2101 consisted of political activity, including phone banks, candidate endorsement, maintenance of a legislative desk at Annapolis as well as participation in the COPE program. See pages 179, 188, 189-193, 204-209 of the Moran Transcript.

The Special Master concluded, and so finds, that in the light most favorable to the Local Unions, their permissible expenditures would be less than the 19 percent allowed CWA in the Original Report and that it was not fruitful to analyze those expenditures in detail in the

Original Report. Nor are the amounts involved as indicated on the Classification of Local Expenditures, Supplemental Report Exhibit No. 2, sufficiently large to change to any substantial or meaningful way, the percentages applicable to CWA. Counsel for the respective parties have, with the Special Master's permission, submitted additional briefs on the Local Union expenditures and their allocations, which the Special Master has carefully considered, but such consideration has not resulted in any change in the Special Master's conclusion and findings above set forth.

Inasmuch as the Plaintiffs, who might possibly benefit from such a recalculation, do not insist that this be done, the Special Master does not deem such a recalculation necessary or desirable. In sum, the Special Master holds that the 19 percent of permissible expenditures and 81 percent of nonpermissible expenditures applicable to the CWA expenditures are properly applicable to the Local Union expenditures.

2.

Two Clerical Errors in Appendix D Attached to the Special Master's Original Report

In the Court's Order of January 19, 1981, recommitting this matter to the Special Master, two clerical errors in Appendix D attached to the Special Master's Original Report of August 18, 1980 were noted with the request that the Special Master in his Supplemental Report indicate whether or not "these labeling errors in any way affect his findings in the case." The Special Master is most happy to do this and regrets the presence of those labeling errors in the Original Report.

The first error was the mislabeling of the item of $416,000, held to be a permissible item, as "Development and Research" when it should have been labeled as "Other Headquarters." As observed by the Court, however, in Note 2 on page 8 of its Memorandum and

Order of January 19, 1981, the parties had agreed that this was an item of permissible administrative expense regardless of its "label," so that the misleading in no way affects the Special Master's finding that this is a permissible item of administrative expense.

The second error was the mislabeling of the item of $24,000 as "Professional Fees" when it should have been labeled as "Staff Moves." There was no sufficient proof that the "Staff Moves" were directly related to, or reasonably necessary for the proper effectuation of collective bargaining, contract administration and grievance adjustment, so that this item of $24,000 should not have been included as "Permissible." Inasmuch as the Plaintiffs, who alone might possibly benefit in a minor and insignificant way from a recalculation based upon the elimination of the $24,000 item as a permissible item—and do not request any such recalculation—the Special Master considers the failure to eliminate this item as a permissible one, to be *de minimus* and does not affect his findings in the case.

The Special Master now turns to a consideration and report upon the revised record-keeping and bookkeeping procedures instituted by the Defendants subsequent to the filing of the Original Report of the Special Master on August 18, 1980.

3.

Revision by the Defendants of their Record-keeping and Bookkeeping Procedures Subsequent to the Filing of the Original Report of the Special Master on August 18, 1980

A. *Preliminary Matters*

The proceedings, testimony and exhibits, memoranda and arguments culminating in the Original Report will be referred to collectively as "Phase I." The proceedings, testimony and exhibits, memoranda and arguments occurring after the filing of the Original Report and

culminating in this Supplemental Report of the Special Master will be referred to collectively as "Phase II."

In the Original Report, the Special Master had already decided that the Defendants (hereinafter CWA) could only charge the Agency Fee Payors for expenditures for collective bargaining, contract administration and grievance adjustment and that CWA had the burden of proving such expenditures. The Special Master defined collective bargaining, contract administration and grievance adjustment, and formulates a rule for establishing such permissible charges, i.e., if the expenditure *directly relates to*, and is *reasonably necessary for the proper effectiveness* of collective bargaining, contract administration and grievance adjustment. The Special Master further held that in view of the First Amendment rights involved, the proof of such permissible expenditures by CWA, the burden of proof requires that CWA prevail, if at all, upon "clear and convincing evidence."

In the Original Report, it was noted that CWA did not maintain its books and records on the basis of allocating all of its expenditures between collective bargaining, contract administration and grievance adjustment, on the one hand and all other expenditures on the other. CWA was thus presented with a difficult task in seeking to meet its burden of proof by clear and convincing evidence in this regard. Because of the lack of required data to support a number of attempted allocations —many involving substantial amounts of money—the Special Master was required to hold such expenditures to be impermissible in whole or in part, so that ultimately 81 percent of CWA expenditures were held to be impermissible and 19 percent permissible. CWA thereafter decided to revise its system of gathering data and its record-keeping and bookkeeping procedures in order to seek to meet its burden of proof in its establishing in the future many of its expenditures as permissible.

Phase II began with the filing on October 16, 1980 of a Motion by the Defendants to re-refer the case to the Special Master pursuant to Federal Rule 53(e): (1) to make a separate determination of the financial obligations of the Local Union Defendants to the Plaintiffs, and (2) to determine amounts properly chargeable in the future by the Defendants based upon their revised record-keeping procedures.

The Court, by its Memorandum and Order of January 19, 1981, granted the Motion to recommit and referred to a proposed conclusion of law recommended by the Special Master in the Original Report in regard to future injunctive relief as follows:

> The plaintiffs listed in Schedule F are entitled to a permanent injunction restraining CWA, its officers, agents and employees from charging or collecting and from attempting to charge or collect from the plaintiffs in excess of 19% of the amount of dues, assessments or other payments payable by the members of CWA, subject, however, to modification by the Court upon a proper motion by CWA for such modification and the establishment by CWA at the time of hearing on such a motion that amounts in excess of such 19% were properly chargeable in the future to the plaintiffs as Agency Fee Payors.

In the Memorandum and Order of January 19, 1981, the Court also stated:

> In Judge Blair's order of March 16, 1979, the burden of proving the proportion of expenditures properly chargeable as an agency fee was placed on the union defendants. Within this framework, the Special Master disallowed many of defendant CWA's expenditures since the unions failed to meet their burden of showing that those expenses were attributable to collective bargaining, contract administration, or grievance adjustment activities. In many

instances, expense items were wholly disallowed because the union's record-keeping procedures failed to establish the portion of that expense which should be allocated to chargeable activities. The defendants now seek to present evidence to the Special Master of modified bookkeeping procedures which would enable the unions to establish more accurately the percentage of expenditures on collective bargaining, contract administration, and grievance adjustment. The defendants argue that future injunctive relief should reflect this modified percentage figure.

Substantial testimony has been produced by the respective parties in Phase II.

There have been file volumes of testimony of expert witnesses and five volumes of consultation of counsel with the Special Master, a total of ten volumes containing 800 pages. The Plaintiffs have introduced 2,296 documentary exhibits; the Defendants have introduced 17 documentary exhibits (including three substantial reports of their expert witnesses), a total of 2,313 exhibits. Counsel for the respective parties have submitted substantial and helpful briefs in support of their respective positions. Phase II has been fully and carefully tried.

In addition to this Supplemental Report, the Special Master has prepared and filed Memoranda and Orders in regard to: (1) questions concerning discovery, (2) a Motion Ne Recipiatur or to Strike, and (3) has filed an order refusing to grant a protective order.

Phase II has been tried by the parties within the legal framework established by the Original Report. Although the Defendants have indicated that they reserve the right and expect to challenge in the District Court and possibly later on appeal many of the findings and holdings of the Special Master (as well as holdings of the District Court prior to the original reference to the Special Master), the Defendants and their experts have accepted for

the purposes of the Phase II hearings only, the burden of proof by clear and convincing evidence placed upon them to establish the percentage of permissible expenditures for which they may charge Agency Fee Payors (the establishment of 19 percent as such permissible expenditures and of 81 percent as nonpermissible charges). The Defendants have also accepted the holding that the record-keeping and bookkeeping methods of the Defendants before the filing of the Original Report were not adequate to enable them in a number of instances to meet the required burden of proof by clear and convincing evidence, and generally accepted the method of calculations used by the Special Master in reaching the results in the Original Report.

It is recognized that the 19 percent of permissible expenditures (and 81 percent of nonpermissible expenditures) continue in effect until the Defendants are able to meet their burden of proof by clear and convincing evidence that other percentages are appropriate.

Indeed, as already observed, the primary purpose of the Defendants in seeking and obtaining the re-reference to the Special Master was to seek to establish by new procedures for obtaining data, of record-keeping and bookkeeping, new percentages of permissible and nonpermissible expenditures.

To this end, the Defendants employed and used as expert witnesses Dr. Edward C. Bryant, Harvey J. Nuland, and Dr. Emanuel Saxe. The Plaintiffs employed and used as expert witnesses Dr. Bruce W. Hamilton, Dr. David F. Hawkins and Dr. Charles R. Mann. They are all distinguished experts in their fields. Their distinctions and qualifications will later be refererd to when their testimony is considered in this Supplemental Report.

The experts for the Defendants, for the most part, used the terminology "retainable" rather than "permis-

sible" as used in the Original Report and the word "nonretainable" as the equivalent of "nonpermissible" used in the Original Report.

B. *The Testimony*

1. *Dr. Edward C. Bryant*

Dr. Bryant received his Ph.D. Degree in Statistics with specialty in sample design from Iowa State University, which he studied under Professors H. O. Hartley and R. J. Jessen. He is the co-founder and Chairman of the Board of Directors of Westat, Inc., on employee-owned research corporation with headquarters outside Washington, D.C., near Rockville, Maryland.

Dr. Bryant has had over thirty years of experience in statistical research, consulting, teaching and application of statistical methodology and the direction and administration of research in a number of important fields. His field of specialty is survey design. He has been responsible for or has participated in the design of numerous national, regional and local probability samples. His principal contribution to the theory of sample design has been his work on multiway stratifications designs.

Dr. Bryant is a fellow of the American Statistical Association. He has been a member-at-large of the Council of that organization as well as President of the Washington Statistical Society. He is also a member of several other related societies and organizations.

He has written extensively including "Statistical Analyses," second editor McGraw-Hill Book Company, New York, 1965, and is the author or co-author of some eighteen selected articles in regard to subjects related to his expertise.

He has participated as an expert in a number of cases in various courts, commissions and agencies, and is obviously well-qualified as an expert witness in his field.

The Special Master found Dr. Bryant to be a knowledgeable and impressive witness. In addition to his clear grasp of the elements involved in his field of expertise, the Special Master found that Dr. Bryant is a truthful, careful witness and is a person of integrity.

Westat, Inc., incorporated in 1963, is an impressive organization. It has a permanent staff of more than 240 persons who possess the necessary technical and managerial skills to design and direct major large-scale research efforts for agencies of the United States Government as well as a broad range of institutional and business clients. Westat, Inc. has become one of the leading survey research organizations in the United States.

In his testimony, Dr. Bryant described his employment by the Defendants as follows:

> I was retained to develop a system of time recording which would be capable of producing estimates of retainable, nonretainable and administrative time for the employees of CWA; and as a part of that assignment to look into the feasibility of collecting the necessary data by sampling procedures, and if in my judgment this turned out to be feasible, to develop the forms and do some pretesting of the data collections.

Pursuant to this employment, Dr. Bryant prepared a report, dated April 24, 1981, and entitled: "Report on the Design of a Sampling System to Provide the Basis for Allocating Retainable and Nonretainable Union Expenses to Objecting Agency Fee Payers," (hereinafter the "Westat Report"). This Report was admitted into evidence and will now be described more fully.

As described by Dr. Bryant in his testimony, the Westat Report indicates a system for recording the time of the CWA Staff for each district and headquarters de-

partment in order to determine the amount of time spent on retainable and nonretainable activity, with a division of time for the Secretary-Treasurers Department into "Retainable," "Nonretainable" and "Administrative."

a. *Descriptive Categories of CWA Activities and their Allocations*

Counsel for CWA supplied Dr. Bryant with a list of 25 descriptive categories of the activities of CWA. In Phase I, the 21 activities used in the Beans Report had been taken from the Answers of the CWA Defendants to the Plaintiff's First Amended Interrogatories. This list of 21 activities appears as Appendix B attached to the Original Report and are summarized in Note 5 appearing on page 17 of the Original Report.

The list of 25 categories of activities supplied to Dr. Bryant appears on Attachment E-5 to the Westat Report. This list is a refinement of the 21 activities list and contains a classification "25 Other" which is to be used when the activity does not fit into the other 24 activities and may be used for possible changes in CWA functions in the future.[1]

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[1] The list in the Original Report read: 1. Grievance up to arbitration; 2. Arbitration; 3. Administration of collective bargaining agreement; 4. Preparation and negotiation; 5. Organizing; 6. Conducting Union meetings; 7. Labor legislation; 8. Strike and picket activity; 9. Recreation and social activities; 10. Retirement, etc.; 11. Training; 12. Publications; 13. Political activities; 14. Presentation of Court activities; 15 Defense of Court activities; 16. Activities re impr. terms and conditions; 17. Reports and References to Agreements; 18. Monitoring local offices; 19. Community Affairs; 20. C.O.P.E.; and 21. Per Capita Contrib.

The list provided to Dr. Bryant and used in the Westat Report read: 1. Formulating contract proposals, contract negotiations, and contract ratification; 2. Handling questions and complaints about working conditions, benefits and contract rights; 3. Handling grievances and arbitrations; 4. Other meetings, phone calls, etc. with company representatives; 5. Reading or discussing background information and news related to wages, working conditions, etc.;

Dr. Bryant testified that the list of 25 categories was "reasonably comprehensive." He also stated that: "We were worried about the Other category, but it appeared that there was not another classification of activities not included in the system but that those hours changed as Other could really have been classified in other ways."

In the Westat Report, the 25 descriptive categories are allocated to five major categories, i.e., 1. Retainable; 2. Other retainable; 3. Administrative; 4. Allocable; and 5. Nonretainable. Generally, this allocation follows the findings by the Special Master in the Original Report. Using the numbers in the list of 25 categories in Note 1, numbers 1, 2, 3, 4, 5, 6, 7, 8 and 9 are placed under "1. Retainable." This allocation is based upon the theory that the Special Master in the Original Report held that CWA had met its burden of proof that these 9 categories were retainable.

Under the heading "2. Other retainable," were placed "15. Organizing" and "23. Public relations." The Special Master, in the Original Report, held that on the record presented to him these activities were nonretainable. CWA, however, takes the position that they are retainable and these are classified separtely as "2. Other retainable "so that, if upon final judicial determination, they may be placed in either the retainable or nonretainable category without difficulty for the purposes of the mechanical operation of the Westat system.

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6. Government agency, board or regulatory body matters; 7. Demonstrations, leafletting, strikes about CWA wages, working conditions, etc.; 8. Steward meetings or training; 9. CWA schools; 10. CWA conventions or monthly, area, etc. meetings; 11. CWA local union meetings; 12. Local union administration; 13. Office management and administration; 14. Meetings or conventions of other labor organizations; 15. Organizing; 16. Legislative activities; 17. Registration and get out the vote activity; 18. COPE fundraising; 19. Other political activity; 20. Community service activity; 21. Time off-e.g., sick time, vacation; 22. CWA publications; 23. Public relations; 24. International affairs; 25. Other.

Under "3. Administrative" are placed numbers 10, 11, 12 and 13. The allocation of time in this category as between retainable and nonretainable is to be on the basis of the allocation of the nonadministrative time of each district or department. For example, if 60 percent of a district's nonadministrative time were retainable and 40 percent nonretainable, its administrative time would be allocated on the 60-40 division. It should be noted that the 13 times considered as "Administrative Expense" on pages 31 to 36 of the Original Report have been either consolidated in numbers 10, 11, 12 and 13 or reallocated to other numbers. It should also be observed that there is no category "Legal" as there was in the Oriignal Report (pages 26 and 33). Legal expenses are a part of various categories in the list of 25 categories.

Under "4. Allocable" are placed numbers 6, 16, 20, 22 and 25. These categories involved activities in which CWA will seek to establish under the guidelines in the Original Report what portions, if any, would be retainable or nonretainable. It will contend that if the portion of the activity is work-related as directly related to the working lives of CWA represented employees, it would be retainable; if, however, the portion of the activity is citizen-related to the everyday lives of CWA represented employees, it would be nonretainable.

Under "5. Nonretainable" are placed numbers 14, 17, 18, 19 and 24 which were held nonretainable in the Original Report.

b. *The Westat System*

Dr. Bryant, in his testimony, described the Westat data collection and sampling system as having five component parts, i.e., (1) construction of the sample, (2) design of the instruments and instructions, (3) pretest of the system, (4) implementation of the system, and (5) monitoring of the system.

(1) *Construction of the Sample*

Dr. Bryant concluded that a sample over time would be appropriate. He therefore designed a sampling plan on the basis of the data provided by CWA's four-month study. This four-month study was begun by CWA on December 1, 1980 by the use by its officers and employees of daily activity logs indicating the amounts of time spent by them on each of 25 identified activities. As of the time of the preparation of the Westat Report, all of the data from the daily activity logs had not been summarized, but at the last tabulations as of that time 114,992 hours were covered, excluding sick leave, vacation and other time off. Some daily logs were missing after March 15, 1981, but it was estimated by Westat that between 85 and 90 percent of the manhours worked were in the data base. In the Westat Report, it was noted that four months of data do not provide an adequate base for distributing costs because of the controversy in regard to whether some of the identified activities are retainable or nonretainable, and more importantly, the four-month period of data cannot be presumed to be representative of any time interval (other than itself) and therefore does not provide an adequate basis for allocating either past or future costs. Such collected data, however, in the opinion of Westat, does provide a satisfactory basis for a sample design, assuming reasonably that the variation observed during the 15 weeks for which usable data were collected is typical of the variation one could expect during successive sampled weeks in the data collection plan with some adjustment for some headquarters functional units.

Dr. Bryant derived an estimate of sampling error of within 2 percentage points of the correct estimates, with odds 19 to 1, which in his opinion is "on the conservative side." He then recommended a sampling schedule, noting that the data provided by the study were "more

extensive than the amount of data the sample designer usually has available to him." The error for the entire system appears in "Attachment C" to the Westat Report.

(2) *Design of the Instruments and Instructions*

The initial draft of the reporting form was prepared by Dr. Bryant. That original draft was given to the experts at Westat for rearrangement and competition. Two forms of Activity Reports are in Attachment F of the Westat Report, a blank form as F-1 and a form completed by an employee as F-2.[2] The Activity Reports filed with the Westat Report describe the activity involved, allocated under categories I, II, III and IV with blank boxes to be checked by the employee of CWA if applicable. It has a space for the date, name and social security number of the employee, with a space to indicate the number of hours spent under each category.

Also attached to the Westat Report as E-1 is a letter from President Watts to All Officers and Staff, dated December 22, 1980 in regard to the new Daily Activity Logs forms and instructions in regard to its use, and with a reminder that the forms be completed "completely and accurately."

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[2] In the Defendants' Supplemental Hearing Brief, page 31, is a sample of a completed form which contains the same basic material in the forms F-1 and F-2 of the Westat Report, but is somewhat different from those forms. The Special Master ruled in his Order of August 13, 1981 that material in that Brief as well as Appendices C, D and E filed with that Brief would not be struck out as moved by the Plaintiffs, but would not be considered as new evidence in the case or part of the record made in the case by testimony and exhibits and closed on June 22, 1981, but could be used by the Defendants in their argument for illustrative purposes. The Special Master considers the sample of the form on page 31 of the Defendants' Brief as illustrative of the further development of the reporting form.

In addition, a form of instructions in regard to the Officers and Staff Daily Activity Log (E-2), a list of the 25 categories (E-5) and a form of completed Daily Activity Logs (E-6 and E-7).

(3) *Pretest of the System*

Dr. Bryant indicated in his testimony that pretesting was necessary to find out what is wrong with the proposed system and to perfect the forms. This was done by Westat and as a result certain minor changes would likely be made, but in his opinion the basis structure would not change.

(4) *Implementation of the System*

Dr. Bryant stated in his testimony that revised forms, instructions and list of categories were sent to various employees during the time frame previously mentioned, and a study made by Mr. DiGaetano of Westat, with a check by Dr. Bryant on a thumb-through basis. The responses in District 10 were included because of the substantial number of responses to the category called "Other," considered to be a possible overuse of that category, like resulting from a misunderstanding of some items. There was disclosed a misclassification of travel time to the "Other" category rather than to the category for which the travel time was conducted.

Dr. Bryant also indicated that the forms and instructions would be revised to a minor, but not substantial, extent.[3]

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[3] This was done and the revised forms and instructions are included in Appendix C filed with the Brief of the Defendants, as well as a Practice Report and Schedule for filing Activity Reports. In Appendix D filed with the Defendants' Brief is a verbatim transcription of a meeting of the CWA Staff in the Sheraton-Boston Hotel, Independence Ball Room, Boston, Massachusetts, on July 4, 1981 at 10:00 a.m. at which the members of the CWA Staff were addressed by President Watts who reviewed the background of the

(5) *Monitoring the System*

In his testimony, Dr. Bryant stresesd that monitoring the system was "extremely important." He recommended that an employee of CWA would originally monitor the distribution of the forms and instructions and should answer questions which arose in the field about the handling of special situations. This was done by Patsy Fryman, assistant to President Watts. Dr. Bryant also indicated that there should also be a monitor from an outside organization, not only for the four-month period but on a continuing basis.[4]

The Westat Report on page 3 also stressed that it recommends "A monitoring system which would provide professional oversight of adherence to the data collec-

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case with particular reference to the Original Report and the necessity for improved methods of data collection and accounting methods. He stressed forcefully the importance of the new system and diligent and accurate information being supplied and that making the system work was part of their job and, further, that any failure on their part would be considered a serious default and treated as such. He then turned the meeting over to Ralph DiGaetano, who gave a full explanation of the revised forms and reporting system which was to begin on August 1, 1981. Forms of Activity Reports were distributed to be filled in by the Staff Members for a typical day. Questions from the floor were also answered.

Appendix E filed with the Defendants' Brief contains a copy of a letter from President Watts to all CWA Vice Presidents in regard to the New Staff Activity Reports with lists of Persons in the Districts Delegated to Coordinate Activity Reports and lists of Staff Members for the respective 12 districts with spaces for check marks opposite these names for the seven days of the weekly periods when reports are to be made. These Staff Activity Reports are to be returned to Patsy Fryman, assistant to President Watts. For the reasons stated in Note 2, *supra*, these revised and other materials are not part of the record and only represent illustrations of the type of revisions and procedures possibly intended by Dr. Bryant.

[4] In the Defendants' Brief it is stated that Westat has been selected as the outside organization to do the monitoring. Here again, this is not part of the record but is illustrative of the type of monitoring which could be established on a continuing basis.

tion plan and interviewing of employees on a sample basis. These monitoring services should be provided by an outside organization. . . ."

2. *Harvey J. Nuland*

The second expert witness who testified for the Defendants was Harvey J. Nuland, a Certified Public Accountant, who has engaged in public accounting for some thirty years. Most of the thirty years of practice has been with Buchbinder, Stein, Tunick & Platkin ("Buchbinder, Stein"), a firm of certified public accountants with offices in New York City. Most of Mr. Nuland's experience has been with nonprofit organizations. Much of Buchbinder, Stein's practice has been with labor union's, and Mr. Nuland primarily spends his time dealing with them. The Special Master found that Mr. Nuland was a knowledgeable, frank and truthful witness.

Mr. Nuland was employed by counsel for the CWA Defendants in October, 1980 to testify as an expert witness in the case. He describes the scope of his employment as follows:

> I was retained to recommend a system of apportionment that would distribute or categorize CWA's expenditures into specific categories: namely, retainable and nonretainable expenses. At the same time, I was asked to assist in obtaining other experts in this matter.

Nuland I

He prepared for Buchbinder, Stein a report entitled "Communications Workers of America AFL-CIO, Report on Design of Expense Allocation System," which was presented to the Special Master and to counsel for the Plaintiffs on May 1, 1981. This Report was admitted into evidence on June 16, 1981 as Defendants' Exhibit No. 5 and will hereinafter be referred to as "Nuland I." There-

after, he prepared a second report with the designation "Communications Workers of America AFL-CIO, Report on Design of Expense Apportionment System" which was filed and admitted into evidence on June 16, 1981 at Defendants' Exhibit No. 7. The second report will hereinafter be referred to as "Nuland II." It contains several differences from Nuland I.

Nuland I recites in its Introduction that Buchbinder, Stein has reviewed the Original Report and found that it indicated:

1. Some categories of CWA expenditures are directly attributable to retainable and non-retainable classifications without need for additional allocation. For example, negotiation expenses are retainable, while expenses for foreign affairs are non-retainable.

2. Allocations made in some categories are accepted by the Master as valid. For example, expenses for the CWA *News* and CWA *Newsletter* are allocated based upon an analysis of their content.

3. Those categories identified as administrative expenses are allocated between retainable and non-retainable classifications on the basis of the percentage resulting from the division of all other expenses.

4. For some categories, the Report indicated a need for an additional system of allocation. Without such a system, these expenses are classified as non-retainable.

Nuland I also noted that the Original Report suggests that the Statement of Position 78-10 of the Accounting Standards Division of the American Institute of Certified Public Accountants entitled "Accounting Principles and Reporting Practices for Certain Non-profit Organiza-

tions" gives "guidelines for the steps a non-profit organization should take in determining the cost or expense by function."

Nuland I then quotes paragraphs 98 to 100 of the Statement of Position 79-10 and from Appendix B attached to that Statement giving illustrations of how the allocation procedures operate in practice. It also notes that the Defense Production Act Amendments of 1970 established a Cost Accounting Standards Book which had promulgated Standards that provide criteria by which items of cost can be assigned to one or more cost objectives, both on a direct basis and on an allocation basis for indirect costs.

In considering the design of a system that would meet the standards set forth in the Original Report, Buchbinder, Stein reviewed the audited financial statements of CWA, its accounting records and underlying system for collecting, classifying and recording expenses to determine whether the procedures used would provide reasonable assurance that the expenditures are categorized in a way that accurately reflects the CWA expenditures.

Nuland I then reviews the existing CWA accounting system's provisions for the classification of CWA expenditures into functional categories by district, national unit and headquarters departments, supported by object classifications detailing the expenditures covered. The opinion is expressed that the accounting records present an accurate analysis and summarization of operations into program services and support services. The major account classifications are then set forth. Under the heading "Functional Classifications," Direct, National Units, and Departments, are listed 23 classifications taken principally from those used in the Beans Report mentioned in the Original Report; under the heading "Object Classifications," Payroll and Personnel Related Costs, are listed 13 items of Salaries, Pensions, Taxes, Staff Moves, Staff Illnesses and Absences, and the like; and under "Other

Expenses" are listed 13 items such as Printing, Rent, Maintenance of Building, and the like.

In addition, attention is called to expenses charged to seven Special Funds including the Defense Fund, the Organizing Fund and other special funds. Attention is also called to a series of accounts to record expenses for special projects that may occur from time to time. The opinion in Nuland I is expressed that the CWA "record-keeping system provides an accurate base for an allocation procedure, for those expenses requiring additional allocation, that meets the requirements of generally accepted accounting practices."

Next, Nuland I describes the "System Design" which "will provide the basis for the outline of a system which will accurately distribute CWA expenditures by specific categories." It was observed that certain departments performed single functions, easily identifiable, and which require no additional allocation. By the Original Report they are either completely retainable [5] or completely non-retainable.[6] In addition, there are multiple functions performed by certain departments, districts, and national units which require allocation in order to divide retainable from non-retainable expenditures. The Original Report indicated an appropriate allocation system in regard to some of the items [7] wherein the Original Report suggested that allocation between retainable and nonretain-

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[5] Completely retainable includes Negotiations, Development and Research, Collective Bargaining Policy Committee, Contracts Reports and Ratifications Fund and Professional (auditing, actuarial and other nonlegal fees).

[6] Completely nonretainable includes Direct Political Expenditures, Community Services, Foreign Affairs, Affiliation Fees and Organizing Expenditures.

[7] Such as CWA *News* and CWA *Newsletter* based on an analysis of their content; education expenditures based on the project codes and billings; and, committees and conferences based on the nature of the committee or conference.

able might be determined by an analysis of the functions performed by the personnel involved, but for which no sufficient data base was produced to meet CWA's burden of proof.

Nuland I also stated that in order to provide the initial basis for selecting and designing appropriate allocation methods CWA began on December 1, 1980 "an intensive study of the functions performed by its officers and professional staff." The study covered the four-month period from December 1, 1980 through March 31, 1981.

In December, 1980 two forms of Daily Activities Log were used. The first form divided the day into hourly segments, 8:00-9:00 a.m. through 6:00 p.m. The second form divided the day into half-hourly segments. Both forms were accompanied by printed instructions for their use and on the back of each form there were 25 category numbers, 1-25, with a description of the category following each number. These 25 categories are substantially the same as those listed in Note 1, page 11, *supra*. There are spaces for entry of the date, name of employee, district number, title or headquarters department and a space in which the employee enters the category number for the number of hours of work reported.

The third form which in January, 1981 and thereafter, is in effect, a refinement of the prior two forms. It includes a space for the employee's social security number which the accompanying letter of December 22, 1980 from President Watts indicated was "for computer coding." In the letter of December 22, 1980, President Watts called the employees' attention to certain "important reminders" for compliance with the instructions and stated that ". . . it is necessary that you continue to complete these forms carefully and accurately."

The three forms mentioned above were attached to Nuland I as Exhibits 1, 2 and 3, respectively. Samples of the format in which the data will be compiled and

summarized are attached to Nuland I as Exhibit 4. This Data Processing Summary of Daily Activities shows the date, district or department number and the number of the category, the activity description, the name of the employee, the employee's social security number, the employee's title, the date the work was performed, and the number of hours.

In its conclusion, Nuland I states:

> *When* the four-month survey is complete, the information generated by it *will provide* the data for establishing a base for an allocation system for CWA consistent with generally accepted accounting practices. The information *will also provide* a basis for a sampling system designed in accordance with generally accepted principles of statistical sampling. The system will test the continued reliability of the allocation system on a periodic basis and allow for adjustments in allocations to compensate for future changes in union policies and activities.
>
> This report completes the *preliminary stage* in the design of a comprehensive system for the allocation of the operating expenses of the Communications Workers of America, AFL-CIO. Upon completion of the data collection described in the report, specific allocation formulas *will be developed*, and the system of statistical sampling *will then be formulated.* (emphasis supplied.)

Nuland II

Nuland II under "General Comments" states the following:

> This report completes the second stage in our retention by Counsel to the Communications Workers of America, AFL-CIO, to assist in the design and implementation of a system to provide an accurate distribution of the Union's expenditures by specific

category. It presents CWA's expense classification system and recommends a basis for the apportionment of expenditures. For the purposes of this report, apportionment means the division of expenditures between those which are retainable and those which are non-retainable under the Special Master's August Report.

In preparing our initial report and in completing this report, we reviewed the audited financial statements of CWA, their accounting records, and the underlying system for collecting, classifying and recording expenses to determine whether the procedures used provide reasonable assurance that the expenditures are categorized in a way which accurately reflects the Union's operations. CWA's accounting system provides for the classification of expenses into functional categories by executive office, district, national unit, and headquarters departments supported by object expense classifications which detail the expenditures in each functional classification. This provides a set of accounting records that permit an accurate analysis and summarization of operations into program services and support services. As we indicated in our initial report, we are satisfied that the CWA record-keeping system provides an accurate base for apportionment that meets the requirements of generally accepted accounting practices.

CWA's computerized accounting system provides comprehensive records of the components of each expense classification. The Union's system of internal control and procedure for coding assure accurate classification of transactions. Further, the accounting system permits detailed analysis for each account for apportionment purposes.

The apportionment system recommended by this report relies on the categories of accounts used in the

normal business operations of the union for financial reporting and budget making. Each of the major categories of accounts and each object expense classification which breaks down the major categories of expenditures in greater detail are reviewed. Detailed apportionment methods which meet generally accepted accounting practices are recommended for each expense classification.

The report is presented in two sections. The first reviews the six basic apportionment methods recommended. The second presents our recommendations, account by account.

Then follows the first section under the heading "Basic Apportionment Methods." The six basic recommended methods of apportionment are as follows:

a. *Time Record Sampling Method*

The major accounts are:

(1) The administrative operations account under the President's office (account 024);

(2) The finance and office operations account under the Secretary-Treasurer's office (account 025);

(3) The operations of the three Executive Vice Presidents (accounts 085, 086 and 087);

(4) The four national bargaining units (accounts 016, 017, 018 and 021);

(5) The headquarters departments (accounts 020, 022, 023, 026, 027, 029, 035 and 045); and

(6) The 12 districts (accounts 001 through 012).

The wage, salary and related expenditures in these accounts would be proportioned on the basis of the Westat study.

b. *Non-differential Costs of the Salaries of the Elected Executive Board Members*

There are 17 elected members of the Executive Board as provided in the CWA Constitution, i.e., the President (1), the Secretary-Treasurer (1), the three Executive Vice Presidents (3), and the Vice Presidents of the Districts (12). It is stated in Nuland II that there are "inescapable, non-differential costs, which must be incurred by the Union, are fundamental to operations, and do not vary in relation to secondary activities" and "are not appropriate for apportionment and do not require additional record-keeping."

c. *Direct Identification as Exclusively Retainable or Non-retainable*

These accounts are directly identified as containing exclusively retainable or non-retainable expenditures and do not require additional apportionment or record-keeping. Examples are: account 030, "Contributions," as exclusively non-retainable and account 043, "Bargaining Councils," exclusively retainable.

d. *Direct Apportionment*

These accounts should be apportioned between retainable and non-retainable expenditures by a specific system of apportionment peculiar to those accounts. For example, account 031, "Legal," should be apportioned on the analysis of the project codes and billings; account 035, "CWA News," should be divided into two parts, i.e., 1) the salary and expenses of the Editor apportioned on the basis of the Westat study, and 2) the remaining portions of the account on the analysis of content.

e. *Redistribution*

Several accounts contain expenditures which should be redistributed to the executive offices, departments, national units or districts to which they relate. Then,

apportionment should follow the results in the Westat study for the functional classifications for which they are distributed. The example given is account 036, "Pension Fund Expenditures," which should be distributed in direct proportion to salary distribution.

f. *Administrative Expenditures*

A number of accounts contain general administrative expenditures which are attributable to the entry CWA organization and should be apportioned according to the division between retainable and non-retainable expenditures. As examples are account 032, "Convention and Related Committees," and account 033, "Executive Board."

Then follows an "Account-by-Account Recommendation" divided into two subsections: "A. Redistribution and Apportionment of Object Expense Classifications" and giving the expense code number, the expenses used and the recommended method of redistribution or apportionment. Later, account numbers, the nature of the account and the recommended method of redistribution or apportionment.

Recommended Apportionment Methods by Major Accounts

There are 35 account numbers given, from account numbers 1-12, expenses for "Districts 1-12" to account 099, "District Organizing."

Several of the recommended methods of redistribution or apportionment will be later referred to in this Supplemental Report.

Nuland II concludes with the following statement:

> This report completes a review of the CWA accounting system and includes recommendations which, when implemented in conjunction with the recommendations for a time sampling method meeting generally accepted statistical sampling practices be-

ing developed by WESTAT, INC., will provide CWA with an apportionment system which meets generally accepted accounting practices. We are available to discuss the report at your convenience.

Mr. Nuland prepared two helpful charts, one of which is entitled "Communications Workers of America, AFL-CIO, Expense Apportionment System, Major Accounts Apportioned by Time and Activity Codes, Study Methods 1, 2 and 5," admitted into evidence as and filed herewith as "Supplemental Report Exhibit No. 3" and the other chart is entitled "Communications Workers of America, AFL-CIO, Expense Apportionment System, Other Major Accounts, Methods 3, 4 and 6," admitted into evidence as Defendants' Exhibit No. 10 and filed herewith as "Supplemental Report Exhibit No. 4."

Mr. Nuland, in his testimony, made it clear that the decisions made on an annual basis as to what was retainable and what non-retainable would be made by "the accounting department of CWA or such people as are assigned to it and based upon whatever information was available to them or whatever information they had to develop to place them first into those categories." He made it clear also that he was only "retained to develop the system. I have no other connections with CWA" and that he would not audit the data provided by the Westat Report.

Mr. Nuland furher stated in his testimony that "generally accepted accounting principles do not apply to this method or any costing method."

Mr. Nuland also testified that he recommended that the salaries of the 17 elected Executive Board members of CWA, whose salaries are fixed by the CWA Constitution,[8] are to be considered as retainable and not subject

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[8] The Constitution of CWA, as amended June, 1980 (Defendants' Exhibit No. 8), provides in Article IX, page 6, that the Executive Board staff consists of the President (1), the Executive Vice Presi-

to apportionment between retainable and non-retainable. This recommendation was based upon the theory that because of their election, regardless of the functions performed by them, the costs were "inescapable, unavoidable costs that must be incurred by the organizations; their salaries are set by the Conventions; the Constitution sets forth the position and duties of the position, and, therefore, their salary costs are allocated directly to the operation."

3. *Dr. Emanuel Saxe*

The third and last expert who testified for the Defendants was Dr. Emanuel Saxe. Dr. Saxe is a Certified Accountant and has been a professor of accounting for over 35 years at the School of Business and Public Administration of the City College of New York, which later became Bernard M. Baruch College. He is also a member of the New York Bar. He has received many degrees, honors and distinctions. Among them are: Ph.D. and J.D. Degrees from New York University, B.S. Degree in Social Science (cum laude) College of the City of New York. He has also received honorary Doctors' Degrees from Pace University and City University of New York He has been a member of the New York State Board of Public Accounting and has served as vice president of the New York State Society of Certified Public Accountants as a member of its Board of Directors and Executive Committee. For a number of years, he was Editor of "The New York Certified Public Accountant," the official origin of The New York State Society of CPAs. With S.B. Tunick, he published a book "Fundamental Accounting—Theory and Practice," now in its fourth printing, and has engaged in a number of research studies. His

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dents (3), the Secretary-Treasurer (1) and the Vice Presidents (12 one for each of the 12 districts, a total of 17 members of the Executive Board).

colleagues, alumni and friends in 1972 established an Endowed Chair at Baruch College entitled "The Emanuel Saxe Distinguished Professorship" and a series of lectures entitled "Emanuel Saxe Distinguished Lectures in Accounting" was endowed by colleagues and alumni in 1973.

The Special Master found Dr. Saxe to be thoroughly qualified as an expert witness and to be truthful, frank and an attractive witness.

Dr. Saxe was retained by counsel for CWA to testify as an expert in the present case. He described the scope of his employment as follows:

> . . . I was retained to review the reports that were to be filed by the firm of Buchbinder, Stein, Tunick & Platkin, to determine their compliance with accepted cost accounting standards, and, on the basis of that, thereafter to devise a program based on these standards which, when applied to audited financials of CWA would yield data that would disclose the amount of retainable expense versus non-retainable expense.

Dr. Saxe prepared a report entitled "Communications Workers of America, AFL-CIO, Format for Computation of Retainable Expenses," admitted into evidence as Defendants' Exhibit No. 12, and hereinafter referred to as "Saxe Format Report." It consiste of Schedules I, II, IIa and III and a "Summary Schedule."

Schedule I consists of 13 headings running horizontally across a long page and three vertical headings, under the caption "Basis for Distribution"; "Districts"; "National Bargaining Units" and "Departments"; with appropriate account numbers, under that heading, for each item mentioned.

In his testimony, Dr. Saxe indicated the Saxe Format Report would be completed each year, audited and cer-

tified under standards developed by the American Institute of Certified Public Accountants (AICPA), and would set out first CWA's expenditures for retainable activities and, second, for non-retainable activities as defined in the present case. It would use figures on the amount of staff time spent on retainable and non-retainable activity for each executive office, national bargaining unit, headquarters and regional district, as certified by Westat.

It will be noted that Dr. Saxe shares the opinion expressed in Nuland I and Nuland II, and by Mr. Nuland in his testimony that the salaries of the 17 elected officers of CWA who make up its Executive Board should not be apportioned and are all retainable. Dr. Saxe bases his opinion on the fact that their offices are set forth in the CWA Constitution, they are elected, they have unlimited powers and responsibilities and "upon them rests the work of the organization." There is no "necessary relationship between the exercise of their duties and the time it takes." Then too, Dr. Saxe stated, they are "topflight people; they are unique. Their pay would go on if they were all and I think under those circumstances it would be rather ridiculous to ask them to keep time records." Dr. Saxe admits, however, that some accountants would consider such salaries to be overall administrative expenses, but he does not agree with them.

Schedule II is a refinement of Schedule I with substantially the same vertical subdivisions, except that account 025 is subdivided into A, B and C, but with 14 different horizontal classifications. Schedule IIa is entitled "Redistribution of Individual Sub Accounts included in Account 025." There are five horizontal subdivisions for the redistributable portion of Department Expenses (25B) from Schedule II under 1410, Rental of Equipment, 1420, Maintenance of Equipment, 1440, Telephone and Telegraph, 1500 and 1582, Rent and Occupying Expense—Office, and a subdivision for a Total of Columns 1-4. Then follows a "Redistribuation to the following accounts on the basis indicated for accounts 20-29, 35, 45, and 85-87.

Schedule III is divided into two subdivisions: 1) Expenses either Fully Retainable or Non-retainable, and 2) Expenses Apportioned as Retainable, Nonretainable or Apportioned as Overall Administrative Expense. Vertically, under the heading "Account Number" are listed the various applicable account numbers. Horizontally, there are five hearings: "Total Dollars," "Dollars Retainable," "Dollars Non-retainable," Dollars Apportioned as Overall Administrative Expense" and "Basis for Apportionment."

The totals of Schedules I, II and III are transferred to the "Summary Schedule" where the subtotals and percentages are calculated, with the addition of Overall Administration Expense (from Schedule III) apportioned on the basis of Retainable and Non-retainable Dollars in Subtotals, and then with the Grand Totals of the dollar amounts. The Summary Schedule contains a Note to the effect that it is assumed that the balance in account 040 (Contingencies) will have been redistributed to and incorporated in all applicable related costs prior to completion of the Schedules.

Dr. Saxe, in his testimony, carefully and helpfully explained each item in the Saxe Format Report to the Special Master. He also testified that the Saxe Format Report when properly completed by an independent certified public accountant could be incorporated in a special purpose report, to which should be attached an unqualified opinion by the attesting accountant "to the effect that the data therein have been compiled in accordance with the rules respecting retainable and non-retainable expenses, as laid down by the Court in this case, and also that they are in conformity entirely with the audited financials from which it is drawn." In Dr. Saxe's opinion, such a Special Purpose Report would be entitled to acceptance by third parties.

Dr. Saxe, on cross-examination, indicated that, although well-qualified, independent certified public accountants

were all bound by and followed established general accounting principles, they could—and did—differ in regard to the application of those principles when considering special situations. He also indicated that he would accept the data and other matters contained in the Westat Report with examination by him and that he had not run any figures of the CWA annual financial system through the Saxe Format Report.

The opinions of the experts produced by the Plaintiffs disagreed with several of the opinions of the experts who testified on behalf of the CWA Defendants. The testimony of the Plaintiffs' experts will now be considered.

4. *Dr. Bruce W. Hamilton*

Dr. Hamilton, the first expert to testify for the Plaintiffs has impressive credentials. He received his B.A. Degree from Grinnel College and his PhD. Degree from Princeton University. He has had past employment as a Program Analyst with the Federal Bureau of Budget. He has been an Assistant Professor of Political Economy at The Johns Hopkins University and since July, 1978 has been an Associate Professor of Political Economy at that University. Among other courses, he has taught Microeconomics (the theory of markets, production and consumption). One of his regular courses is graduate Microeconomics theory to Ph.D. students. One of the problems that arise in these courses is joint production. He is a member of the Editorial Board of the "Journal of Urban Economics." He has published numerous articles, the most important one so far as the case is concerned, being "Indivisibilities and Inter Transportation Plant Cost: Do They Cause Market Breakdown" in the Journal of Urban Economics of January, 1980. The Special Master found that Dr. Hamilton was a well-qualified, frank and truthful expert witness.

In his testimony, Dr. Hamilton stated that the concept of joint production in economics is "a problem which

arises when a single input is used almost automatically in the production of two outputs of two or more."

To illustrate this, Dr. Hamilton used the standard textbook example of the person who raises sheep who produces mutton, wool and sheep dung. There is no way of producing mutton without having the other two products exist. There is always a question of what to do with them and "if there is no demand you just dispose of them the best you can. How can one determine the cost of producing wool? There exists no way of sorting out what the costs of producing the wool and mutton separately." He further stated that "the most important implication (if the joint production concept when applicable) for microeconomic theory is that there is no unimpeachable way to assign costs to a given product."

Dr. Hamilton was supplied copies of Plaintiffs' Exhibits Nos. 1540, 1536, 1539, 1544, 1548, 1557, 1559, 1560 and 1561, being completed Daily Activity Logs, for examination in the light of the joint production concept. Most of the Exhibits involved trips for more than one purpose. Exhibit 1540 involved an airplane trip from Washington to Miami and back to (1) attend a CWA Ways and Means Committee meeting, and (2) an AFL-CIO meeting. The first purpose would be at least partially retainable, the second, non-retainable. Dr. Hamilton concluded from his study of the Exhibits that there would likely exist "many examples of joint products for which it is impossible to assign the use of input to one particular output."

After considering Nuland II in regard to the apportionment of the salaries of Executive Officers, Dr. Hamilton was of the opinion that "there are some activities of the Executive Officers that can be assigned to the retainable and non-retainable classification, but that under the joint production theory 'any assignment of that officer's salary between the categories is arbitrary' . . . ."

On cross-examination, Dr. Hamilton agreed that economic theory recognizes that these are joint costs but does not provide "an unimpeachable means of allocation such costs" and further, that economic theory cannot "provide an assurance of how the various joint costs in this case should be allocated."

5. *Dr. David F. Hawkins*

The second expert witness who testified for the Plaintiffs was Dr. David F. Hawkins.

Dr. Hawkins also has impressive credentials as an expert witness. He received his B.A. Degree from Harvard University in 1956, his Master of Business Administration Degree (cum laude) from the Harvard Business School in 1958 and his Doctorate of Business Administration Degree (with distinction) also from the Harvard Business School in 1962.

He began as a Research Assistant at the Harvard Business School in 1961, became Assistant Professor in 1962, Associate Professor in 1967 and full Professor in 1970 until the present time.

Dr. Hawkins has written a book entitled "Corporate Financial Reporting: Text and Cases" which has been through two editions (the second being the Revised Edition), and Dr. Hawkins is about to prepare a third edition. It is considered to be one of the leading textbooks in the field of an advanced nature and has been used at some 600 schools at one time or another.

He has received several special honors and awards including the Newcomen Society Award, the McKinsey Award and the Graham & Dodd Scroll Award. He has also been and now is a member of the Financial Accounting Standards Advisory Council which gives advice to the Financial Accounting Standards Book, he being presently on the important committee on agenda.

Dr. Hawkins had written scme 64 publications, articles and bulletins, has written nine books and monographs (same in collaboration with others) and including "Corporate Financial Reporting: Text and Cases" already mentioned, and has contributed to 18 other books and monographs including "A Case Book in Social Work Administration (New York Council of Social Work Education) 1970, edited by Harry A. Schatz. He has also acted as a consultant to the General Electric Company, Honeywell, Inc., Alcon, American Express Company, International Paper Company and Miami Coca-Cola Company, involving, in various instances, developing accounting responses to inflation, developing a profit-oriented management control and accounting system for a specific division, and to develop product cost data for decision-making process and inventory evaluation purposes. He has also advised certain nonprofit entities such as the New York Catholic Charity and KLB Child Care Development Center costs of that Center in connection with a grant by an agency of the federal government.

Dr. Hawkins was employed by the Plaintiffs to present expert testimony in this case. In preparation for his testimony, he reviewed the opinion of the Supreme Court of the United States in *Allen*, the Original Report, Nuland I and Nuland II, the deposition of Dr. Saxe and his working papers and the Memorandum and Order of January 16, 1981 re-referring the case back to the Special Master.

In his testimony, Dr. Hawkins gave interesting and helpful explanations in regard to Generally Accepted Accounting Principles, Generally Accepted Audit Standards and Generally Accepted Accounting Practices or Procedures. In commenting on the use generally of these principles, standards and practices in situations in which the relationship between the parties is involuntary, Dr. Hawkins stated:

> It's very hard to think of any circumstances other than the one we're in now with the agency fee payers. It's very hard indeed. In the normal commercial arrangement of people outside the firm, people outside the entity, you have options. If you don't like the accounting, as an investor you can sell the stock. If you don't like the accounting, as a broker you can call the loan or not get involved in the deal in the first place. As a buyer of services or product, you can buy somebody else's.
>
> This does become a concern when you have monopoly situations, however, and there the concern comes when there is dissatisfaction between the person external to the firm whose interests somehow are being touched by the accounting practices of the firm, and they have no option to go anywhere else. Those situations usually end up in the courts, and then the court applies other standards than accounting, such as fairness, reasonableness, social standards, legal standards.
>
> Later Dr. Hawkins testified:
>
> . . . I find it very difficult to come up with examples an involuntary kind of relationship to even approach this situation. In my experience, it's unique.

In Dr. Hawkins' opinion, the data to be obtained from the Daily Activities Logs could not properly be relied upon in making the desired allocations. He noted that in any attempt to audit the reliability of the timekeeping records, auditors do five things, i.e., (1) they observe, (2) they examine documents, (3) they perform financial analyses, (4) they trace documentation, and (5) they test internal controls.

(1) It would be very difficult for an auditor or anyone to observe the filling out of the logs on a continuous basis or even upon a sample basis.

(2) Any review of the logs for completeness, their consistency and the relationship between the activity and the coding would take an enormous amount of time and and is probably not a very feasible auditing approach.

(3) Often accountants compute financial ratios on the financial statement they are examining to see if the financial ratios are in tune with past experience or how they compare with comparable ratios of comparable companies. In this case, however, as Table 4 in the Westat Report indicates, a standard deviation around the means, the 15 weeks, 100 percent census of those who filled out the logs would in some instances be too great for a proper analysis and this is not a possible way to audit.

(4) There is very little documentation other than the logs to observe. Calendars might be observed but they only indicate where the employees were at a particular time. Then too, the Plaintiffs would find it too expensive to become involved in this type of activity.

(5) There are no internal controls relating to the logs, so that the technique of internal controls is not available.

In summary, in regard to the logs, Dr. Hawkins was of the opinion that auditors should use *all* of the five techniques mentioned and this cannot be done. He states: "so at the conceptual level it's difficult, and at the practical level it's difficult in this case, if not impossible."

So far as the Westat Report proposes a system of auditing essentially based on interviewing, it necessarily relies on guesstimates and very poor recollections which the Special Master in the Original Report found to be insufficient for CWA to meet its burden of proof.

Not only is this type of data unauditable but the underlying system itself does not lead to reliable descriptions of how people spend their time. He indicated that from his experience and study, people are resentful of the invasion of their privacy, they are never quite sure of how

the log will be used, they tend to put off filling out the logs and seek to fill them out based on what they suppose would be a "standard" allocation and how long they believe a job "should" take, rather than what it in fact did take. Nor does the time spent fall into predetermined "slots" of various time periods. He does not "have too much faith in a system like this."

In regard to Nuland I and Nuland II, Dr. Hawkins noted that these two reports were to be implemented by the Saxe Format Report and all could be considered together. As an accounting matter, he did not find that these documents were "responsive to the situation at hand." In Dr. Hawkins' opinion, there should be some criteria set up before evaluating such a system, and he saw no such criteria presented in the documents. There was no examination by Mr. Nuland of the costs and he relied on counsel for CWA primarily to tell him what was retainable and non-retainable. Since "counsel is representing one of the antagonists in this operation, that was hardly the source for an unbiased opinion." Much reliance was placed on generalized concepts such as "generally accepted accounting principles" or "generally accepted accounting standards" almost "treating the issue in abstract."

Dr. Hawkins was of the opinion that the approach used was biased toward the CWA interests in at least four regards:

a. In the inclusion of all elected officers in the retainable category, Dr. Hawkins was not impressed with the arguments advanced for this determination and observed that an examination of their activities would likely show that many of their activities are not connected with collective bargaining, contract administration or grievance adjustment. Those officers can, and have, kept time records and should be required to do this. Nor would the placing of these salaries in the administrative classifica-

tion be satisfactory in that by so doing some of the non-retainable activities would end up by being allocated to retainable.

b. Using manhours for the allocation is most unusual. Most cost systems in nonprofit organizations indicated that the cost objective is the basis of allocation.

c. It is generally recognized that cost and activity are much more related in terms of overhead than to individual activity. The base of a system on manhours gives a bias the allocations in favor of CWA.

d. The CWA subsidy to the Districts is a subsidy for use in all the activities of the District and supports all activities. The subsidy to Districts should not be entirely allocated to the retainable category.

In summary on these points, Dr. Hawkins observes:

> . . . the theory that really comes home to me is (that) the system is in the hands of the union, who are less than objective, and in that situation, anything but the most direct sort of approach will probably continue to lead to litigation, and I would favor something that very clearly emphasizes the clear and convincing evidence approach . . . .

Dr. Hawkins stated that in his opinion Nuland I, Nuland II, the Saxe workpapers and the Westat Report do not meet the criteria he had set out.

6. *Dr. Charles R. Mann*

The third and last expert witness who testified for the Plaintiffs was Dr. Charles R. Mann.

Dr. Mann received his B.S. Degree in Applied Mathematics from Polytechnic Institute of Brooklyn, his Masters of Science Degree in Mathematical Statistics from Michigan State University and his Ph.D. Degree in Statistics from the University of Missouri. He taught statistics at the graduate level at George Washington Uni-

versity in Washington, D.C. from 1969 through 1973. In 1977, he formed Charles R. Mann Associates, later incorporated, which has its offices in Washington, D.C. Dr. Mann is a consulting statistician. Between 80 percent and 90 percent of the work of his company has been in connection with equal opportunity work. He has testified as an expert witness in 34 cases, 15 of which were in United States District Court in a number of districts including Maryland.

In his consulting work, Dr. Mann provided consulting in statistical analyses, applied probability, survey design, questionnaire design, mathematical and economic modeling and mathematical statistics. He has published several articles on matters related to statistics.

The Special Master found Dr. Mann to be a competent, objective and truthful witness.

Dr. Mann testified that in his opinion statistical methods cannot provide a fixed definition of retainable and non-retainable expenditures for use in this case and further that if there is a flawed base, statistics cannot overcome the flaws; at best, it can only assume that the flaws cancel out and if this does not occur the statistical results will be in error and there will be a bias that will appear in the results of which the statistician will not be aware.

Dr. Mann examined the Westat Report to determine the explicit or implicit assumptions that were used in that Report. He stated that there were two types of assumptions: (1) application assumptions and (2) mathematical assumptions.

Considering the Application Assumptions, Dr. Mann testified in regard to nine such assumptions, as follows:

a. *Hours sampled should be representative of the hours not sampled*

Some employees were omitted from the study and the time of those employees would have to be represented

by the hours of those employees included in the study. More importantly, the hours sampled would have to be representative of the hours not sampled, for the study to be pertinent.

b. *The variability during the sample period would be representative of future variability*

The Westat Report is based upon a study for a particular period of time so that the variability in the future periods of study to be pertinent must be represented by the variability for the particular time period.

c. *That it is possible to define retainable hours*

This is essential and somewhere along the line, a definition of retainable hours must be obtained.

d. *The systematic sampling of four-week periods will be representative*

Systematic sampling introduces a special possible type of problem in that there is the potential of automatically overlooking types of work and may miss certain times of particular activity.

e. *That frequent reporting is burdensome*

Dr. Mann has doubts that this assumption is correct.

f. *That monitoring can detect all sources of error*

Dr. Mann doubts the correctness of this assumption.

g. *That all cycles are captured*

Dr. Mann is not convinced that this assumption is correct.

h. *That CWA Districts are homogeneous with respect to variability*

Dr. Mann does not believe that this is correct. He pointed out that Table 4, on page 10 of the Westat Re-

port, in Column 4, entitled "Standard Deviation of Percent Retainable," that there are substantial differences in the percentages of deviation in the Districts. For example, Districts 1, 7, 8, 9 and 10 indicate a percentage of deviation from 4.2 percent to 7.8 percent, whereas Districts 2, 3, 4, 5, 11 and 12 indicate a percentage of deviation from 10.6 percent to 15.9 percent. These figures indicate that the Districts are *not* homogeneous with respect to variability.

i. *That the responses on the logs are accurate*

Dr. Mann believes that this is a "big assumption" inasmuch as accuracy can be influenced by the design and many other factors.

Dr. Mann is of the opinion that a census, rather than a sample as recommended in the Westat Report is much to be preferred. A census would be complete so that there is no loss of information. It lends itself to a review or examination of the items among the samples. The use of a census rather than a sample eliminates the necessity for the variable assumption and estimates and the danger of missing cycles. If a census were used, the assumption in regard to the homogeneity of the Districts is also eliminated.

The principal factor favoring the use of sampling instead of census is cost measured by money, or time or manpower. The form attached to the Westat Report with some modest modifications could be used in conducting a census. Dr. Mann does not believe that cost in this case is a pertinent factor in that he believes that the cost in doing a census would probably be about the same as the cost in doing a survey and possible cheaper since the census becomes routine and avoids much of the analytic and computer methodology. Taking all of the considerations into account, Dr. Mann is of the opinion that in this case a "census is preferable to sampling."

Portions of Deposition Of Irving B. Ross Taken June 1, 1981, Introduced by the Defendants

Irving B. Ross, a Certified Public Accountant, was one of the principal witnesses for the Plaintiffs in Phase I. His education, employment and special expertise in regard to the accounting methods and books of unions are set forth in the Original Report at page 15, and need not be repeated here.

The Defendants took Mr. Ross' deposition on June 1, 1981 excepting that Mr. Ross would testify for the Plaintiffs in Phase II. When the Plaintiffs' plans changed in this regard and Mr. Ross was not called as an expert witness by them, the Defendants, as provided in the Federal Rules, introduced portions of the Ross deposition as part of the Defendants' case.

Mr. Ross testified in his deposition that there are generally accepted accounting principles for allocating personnel costs. There are also generally accepted accounting standards or guidelines for documenting systems for allocating personnel costs. They are contained in Statement of Position 78-10 in the "June 15, 1980, Exposure Draft, A Proposed Guide for Auditors of Certain Nonprofit Organizations," Chapter 2. There are also generally accepted accounting principles for sampling techniques contained, *inter alia*, in "Statistical Sampling for Attributes, different publications of the American Institute of Certified Public Accountants. There are also generally accepted accounting principles for record-keeping generally in many documents and publications."

Mr. Ross has had occasion to use generally accepted accounting principles on cost allocation in his professional work in regard to nonprofit organizations allocating these costs on a program service basis. Unrelated to the present case, these organizations include: The America The Beautiful Fund, Incorporated, the American Association of Homes for the Aging, and National Lutheran Home

for the Aged. Mr. Ross also recalled that the Brotherhood of Railway and Airline Clerks and the International Association of Machinists and perhaps some other labor unions had cost allocation systems involving timekeeping.

In The America The Beautiful Fund, the President of the Fund as well as other employees kept time records. His firm had no trouble certifying the results of their study or their reports.

Someone in his firm, but not he, himself, might have assisted in designing that cost allocation system.

In regard to the National Lutheran Home for the Aged, his firm took part in the development of a cost funding system with respect to its Medicare and Medicaid cost reimbursements, the decisions in regard to the cost allocation system being made by Group Hospitalization, Inc. which was responsible for the implementation of regulations promulgated by the Social Security Administration, which called for a specific cost allocation system.

Mr. Ross found that the cost allocation system requiring the keeping of time records of the Brotherhood of Railway and Airline Clerks and the International Association of Machinists were deficient as being incomplete, the allocations being inaccurate inasmuch as the information was not representative of the time being spent. The insufficiency was disclosed by comparison of the time records with other documents, correspondence and the testimony of the machinists involved. The system used, however, by The America The Beautiful Fund, the National Lutheran Home for the Aged and the American Association of Homes for the Aging were—all involving cost allocations involving time records—were sufficient to meet Mr. Ross' standards.

The Plaintiffs put into evidence a part of his deposition (Plaintiffs' Exhibit No. 2010) in which Mr. Ross

testified: "I don't think there are any generally accepted accounting principles with respect to apportionments of retainable and non-retainable," to which counsel for the Defendants stated: "I agree."

Plaintiffs' Exhibits of Daily Activities Logs and Vouchers

The Plaintiffs have introduced into evidence some 2,197 Daily Activities Logs and Vouchers submitted and maintained by CWA Officers and Staff, for the four-month period involved in the study. In their Brief in Phase II, they classify a substantial number of those exhibits into groups indicating their alleged errors and lack of acceptability as a basis for any apportionment. These classifications include:

a. Logs which are blank as to activity or code citing, e.g., Plaintiffs' Exhibit Nos. 1462, 1463, 1472, 1474, 1475, 1476, 1477 and 1478.

b. Untimely logs citing, e.g., Plaintiffs' Exhibit Nos. 2012 (various pages), 754, 1457, 1458, 1459, 1460 and 1461.

c. Logs which show the inaccurate results of attempting to force activities into classifications citing, e.g., Plaintiffs' Exhibit Nos. 1502, 1504, 1505, 1506, 1507, 1508, 1511, 1512, 1513, 1514, 1515, 1516 and 1517.

d. Two logs for the same date, but with different information citing, e.g., Plaintiffs' Exhibit Nos. 1516, 1517, 1418, 1419, 1423, 1424, 1425, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 728, 1489, 1490, 1491, 1165, 1492, 503, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 33 and 1500.

e. Logs when taken together are contradictory as to activity citing, e.g., Plaintiffs' Exhibit Nos. 1356, 1357, 1371, 1372, 1418, 1420, 1421, 1422, 1426, 1427, 1428, 1429, 1439, 1440, 1443, 1444, 1358, 1359, 1361, 1362,

1360, 1363, 1364, 1365, 1366, 1367, 1368, 1375, 1376, 1437, 1438, 1445, 1446, 1451, 1452, 1441 and 1448.

f. Logs which contradict themselves citing e.g., Plaintiffs' Exhibit Nos. 1358, 1359, 1361, 1362, 1360, 1361, 1363, 1364, 1365, 1366, 1367, 1368, 1375, 1376, 1437, 1438, 1443, 1446, 1451, 1452, 1447 and 1448.

g. Logs which contradict each other as to code citing, e.g., Plaintiffs' Exhibit Nos. 1369, 1370, 1377, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1398, 1399, 1404, 1405, 1408, 1409, 1410, 1411, 1416, 1417, 1430, 1431, 1432, 1433, 1434, 1435, 1436, 1441 and 1442.

h. Expense vouchers reflecting activities not shown on the logs citing, e.g., Plaintiffs' Exhibit Nos. 2027, 2028, 2031, 2031A, 2032, 2033, 2036, 2037, 2038, 2039, 2040, 2129, 2130, 2131, 2041, 2042, 699, 2044, 2046, 475, 2045, 2047, 436, 2048, 2050, 2051, 2073, 2074, 2054, 2055, 2062, 2060, 2061, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114 2115, 2116, 2117, 2118, 2119, 2123, 2124, 2125, 2126, 2135, 2136, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 496, 2152, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2171, 2172, 2175, 2176, 2177, 2178, 2179, 2180, 2134, 2181, 1084, 2182, 2183-87, 2188, 2191, 801, 2193, 2196 and 2197.

Filed with their Brief in regard to Phase II, the Plaintiffs have filed Appendix I to Appendix XXV indicating the daily activities on the logs assigned to the 25 categories selected by CWA giving the activity description and the Plaintiffs' exhibit numbers. These Appendices consist of 60 pages, A-1 to A-60.

Counsel for CWA introduced into evidence as Defendants' Exhibit No. 16 an Affidavit dated June 26, 1981 of John Oki, employed by CWA to aid in the administration

of the discovery involved in Phase II. Pursuant to his employment he organized and reviewed the system under which documents were provided to counsel for the Plaintiffs for inspection and copying. During the period between April and June, 1981 all headquarters correspondence files for the period April 1, 1980 and March 31, 1981 were produced for inspection and copying by counsel for the Plaintiffs, these files containing some 85,000 documents. As part of the general process, 18,518 daily activity logs containing 150,155 entries as calculated by CWA data processing equipment were provided to counsel for the Plaintiffs. Also for the period between April, 1980 and March 31, 1981, a list of all CWA national vouchers (approximately 80,000) were provided for review and counsel for the Plaintiffs carefully reviewed approximately 26,000 vouchers for the period December 1, 1980 through March 31, 1981 and selected and listed specific vouchers from that list for direct inspection and copying. Approximately ten file boxes of individual vouchers were produced.

Counsel for the Plaintiffs were invited to challenge any of the statements in Defendants' Exhibit No. 16, but have not made any challenge. The Special Master accepts this statement to be correct and established in the case.

4.

Answers, with Reasons, of the Special Master to the Questions and Issues Presented to Him by the Memorandum and Order of January 19, 1981

The Memorandum and Order of January 19, 1981 resubmitting the case to the Special Master for further findings and report presented four questions and issues in regard to which the Special Master was to submit answers and additional findings. These questions and issues will now be presented in the order presented in the Memorandum and Order of January 19, 1981 as follows.

1. *Do the Unions' current record-keeping policies in any way alter the factual findings previously presented to the Court?*

a. The use of the word "current" indicates that the Court expected that the record-keeping position of the CWA Defendants at the time of the hearing before the Special Master would be in place and in actual operation so that they could be applied to the specific figures disclosed by the audited financial reports and records. This, however, has not been the case. The CWA Defendants produced evidence to set forth a system of record-keeping and allocation of costs which they hope and expect to apply *in the future.* This is clear from Nuland I and Nuland II, the Westat Report and the Saxe Format Report, as well as from the testimonies of Mr. Nuland, Dr. Bryant and Dr. Saxe, considered, *supra,* and particularly at pages 8 through 28 of this Supplemental Report.

b. There appears to be no dispute that the percentage of retainable (19 percent) and non-retainable expenditures (81 percent) held to be applicable in the Original Report continues in effect until modified upon a proper motion by CWA for such modification and the establishment by CWA at the time of hearing on such a motion that amounts in excess of 19 percent of CWA expenditures were properly chargeable *in the future* to the Plaintiffs as Agency Fee Payors.

The answer to the first question or issue is therefore "No."

2. *If so, what method of computations would currently reflect the percentage of fee collected which are properly allocable to permissible activities?*

Even though as indicated in the answer to question or issue 1, *supra,* CWA has not yet put in place its proposed new system of record-keeping and allocation, the Special Master believes that the Court expects him to express his

opinion and to make findings in regard to the new proposed system. The Special Master now proceeds to do this.

a. Originally the question arises: Is it *possible* for CWA to devise and implement a system of record-keeping and allocation which will enable CWA to meet its burden of proving by clear and convincing evidence which expenses directly relate to and are reasonably necessary for the proper effectuation of collective bargaining, contract administration and grievance adjustment as required in the Original Report? See page 12 of the Original Report.

Although at least one of the Plaintiffs' expert witnesses expressed some doubt that this would be possible, the Special Master is of the opinion that it is possible for CWA to accomplish this, even though the proposed system set forth in its testimony, is not sufficient at the present time to accomplish this for the reasons later given.

Not only do the CWA exhibits indicate that it is possible to devise such a system, but the excerpts from the deposition of Mr. Ross, already referred to, give specific instances in which systems for nonprofit organizations possibly involving similar elements have been used and apparently audited.

Then, too, it should be remembered that in the Original Report it was determined that CWA was able to meet its burden of proof in regard to 19 percent of its expenditures being retainable. The newly proposed system is designed to enable CWA to increase this percentage.

b. The new system designed by CWA experts is generally sufficient subject to the correction of certain defects, supplying certain omissions and being properly monitored and administered.

The Special Master has concluded, and so finds, that the new system as set forth in Nuland I, Nuland II, the Westat Report, the Saxe Format Study and in the testi-

monies of Mr. Nuland, Dr. Bryant and Dr. Saxe is *generally* sufficient, prima facie, to enable CWA to meet its burden of proof as set forth in the Original Report, provided, however, that certain defects and omissions, later mentioned, are corrected or supplied and provided further that the system is properly monitored and administered as later considered.

The Special Master is not unmindful of the various objections forcefully made by counsel for the Plaintiffs. He is however of the opinion that these objections either do not substantially affect the *general* sufficiency of the proposed new system or will be met and overcome by the proper monitoring and administration of the proposed new system. These objections fall into several categories, as follows:

(1) *Errors in the Daily Activities Logs and Vouchers used during the December-March four-month period.*

The eight classifications of these errors appear on pages 39 and 40 of this Supplemental Report, and need not be repeated here.

It appears from the evidence that:

a) The logs referred to by the Plaintiffs were not collected in a format which was designed and pretested by professionals in timekeeping and survey design and was not subject to systematic monitoring—protections being required in the proposed new system.

b) During the four-month period 18,518 logs were filed containing 150,155 entries (see Defendants' Exhibit No. 16 considered on pages 40 and 41, *supra* of this Supplemental Report). The Plaintiffs have introduced 1,250 logs alleged to contain errors, or approximately two-thirds of one percent of the total entries. This indicates a remarkable degree of accuracy in view of the purpose for which

the logs were to be used (as a measure of variation from week to week) and without monitoring by professionals.

c) Many of the vouchers and logs, as properly understood, are not in error. Inasmuch as the logs in question are not an integral part of the proposed new system but for the more limited purpose mentioned in Nuland I and in the Westat Report, the Special Master accepts Dr. Bryant's opinion that the logs during the four-month period were sufficient for the limited purpose and, in any event, subsequent logs would be subject to monitoring by professionals and most of the possible errors eliminated.

(2) *The Application Assumptions presented in Dr. Mann's testimony have been explained and, where applicable, do not substantially impair the general effectiveness, prima facie, of the proposed new system.*

The Application Assumptions presented by Dr. Mann are set forth on pages 35 and 36 of this Supplemental Report and will not be repeated here. The Special Master is of the opinion that the testimony of Dr. Bryant and the Westat Report indicate that those Assumptions, where applicable, have been satisfactorily explained and do not substantially impair the general effectiveness, prima facie, of the proposed new system.

In the course of this application in the future of the proposed new system to the financial figures of CWA with the required monitoring, deficiencies may be discovered which can be then corrected. It should be remembered that the burden of proof in regard to specific items of expenditures being retainable remains upon the CWA Defendants throughout the operation of the new system and defects in the monitoring or operation of that system may, in a specific instance, prevent the CWA Defendants from meeting that burden of proof.

The substantial weight of the testimony indicates that the new proposed system is in accord with principles and

concepts currently used in accounting and in solving the difficult problems inherent in the allocation of joint costs. All of the experts agree that such allocation is difficult but, as indicated, the weight of the evidence indicates that it can and is being done by the use of the principles and factors involved in the proposed new system.

The burden of proof upon CWA outlined in the Original Report continues and to meet that burden the Special Master has concluded that there are deficiencies in the proposed system which might be corrected, certain omissions supplied, as well as proper monitoring instituted, and an effective administration carried out. When this is accomplished, the new system may well enable CWA to establish by clear and convincing evidence which of its expenses are retainable, i.e., those which are clearly embraced within collective bargaining, contract administration and grievance adjustment as defined in the Original Report, as directly relating thereto and reasonably necessary for the proper effectuation thereof. See page 12 of the Original Report. As noted in the Original Report (page 4) however, the Court's Order of March 16, 1979 (relying on *Allen*) indicates that the burden of proof upon the CWA Defendants did not require "absolute precision in the calculation" and the Court's Order of January 19, 1981, re-referring the case to the Special Master, indicates that the injunctive relief regarding the future collections of CWA should "be more flexible in order to accommodate possible changes in the unions' procedures." With the following recommended changes and additions, the Special Master is of the opinion that the revised new system will meet the criteria established by the Court in this case as well as in the Original Report. The recommended changes and additions will now be considered.

c. *Recommended changes in the proposed new system*

(1) The salaries of 17 elected officers treated as non-differential, inescapable costs in the new system and

treated as retainable expenses, should be abandoned, those officers required to submit daily activities logs and those salaries apportioned to retainable or non-retainable categories as are other salaries. The Special Master accepts in this regard the opinion of Dr. Hawkins, rather than the opinion of Dr. Saxe. It should be remembered also that the 17 elected officers completed time sheets in the CWA study involved in Phase I and their salaries were allocated on the same basis as other salaries. The same type of treatment should be applied in the new system also.

(2) The local subsidies by CWA to the local unions should be treated as an expense of administration rather than as 100 percent retainable. There appears to be a difference of opinion among accountants in this regard, but in the opinion of the Special Master the treatment of this item as "Administrative" appears to be the more reasonable and fair way to treat it.

(3) In the Original Report (pages 14-6), the Special Master held that the Organizing expenses were non-retainable in that CWA had not met the burden of proving that such expenses had any direct effect upon collective bargaining, contract administration and grievance adjustment and were reasonably necessary for their effectuation. He adheres to that position and holding. Organizing expenses are apparently treated in the proposed new system as retainable expenses, contrary to that holding. This issue will necessarily be decided ultimately by the Court. Pending such adjudication, those expenses should be placed in the non-retainable category and column.

(4) Proper monitoring in addition to monitoring by regular employees of the CWA Defendants is a vital and important part of the proposed new system. All of the expert witnesses indicated this, and this is recommended in the Westat Report, page 3. See page 16, *supra*, of this Supplemental Report.

Particularly in view of the involuntary nature of the payments to CWA by the Agency Fee Payors, the adversary nature of this compulsory relationship, and of the constitutional rights and issues involved, it is clear that there must be monitoring of the new system and its operations by a qualified organization, not part of the normal and usual operations of the CWA Defendants. Dr. Bryant so testified and this concept is included in the Westat Report, page 3. At noted earlier on page 16, Note 4, it is stated that Westat has been selected as the outside organization to do the monitoring. Although this statement is not part of the record in this case for the reasons stated in Note 4, it can be taken as an illustration of the type of monitoring which could be established on a continuing basis. Although Westat, and indeed any other duly qualified outside organization which might be employed to perform the monitoring will necessarily be paid by the CWA Defendants, this type of monitoring will be as free of bias in favor of the CWA Defendants as can reasonably be expected. In the opinion of the Special Master, Westat is fully qualified to do the monitoring and particularly in view of the qualifications and integrity of Dr. Bryant, the Special Master is of the opinion that such monitoring would be competently and objectively performed.

The monitoring and its results, supporting papers and data however should, before submission of the results obtained by the operation of the new system for the time period in question, be subject to consideration by counsel for the Plaintiffs and any experts selected by such counsel, who after such consideration, should have the right to object to any part of monitoring and its results, within a reasonable time present these objections to the Court for its decision in regard to those objections. The CWA Defendants in their Briefs state that such a provision should be included in any decree recommended by the Special Master.

In addition to the above provisions in regard to the review of the monitoring, its results and the results of the operation of the new system from time to time, a question arises in the mind of the Special Master in regard to who should pay for the reasonable value of the services of the inspecting counsel for the Plaintiffs and of any expert selected by such counsel. Dr. Mann adversely criticized the proposed new system on the ground that, in his opinion, it would cause additional litigation which the Plaintiffs might well not be able to afford. In any event, it seems to be reasonable, fair and just to the Special Master that, inasmuch as the review by the Plaintiffs is an integral part of the monitoring process required by the new system, the CWA Defendants should pay to the Plaintiffs the reasonable value of the services of their counsel and any expert selected by him, rendered in connection with their review of the above-mentioned monitoring process from time to time. The parties might well agree upon the value of such services, but, in the absence of such agreement, the Plaintiffs could submit the question of the amount of such reasonable compensation by an appropriate motion to the Court for determination, which after hearing the CWA Defendants, would award a monetary judgment for the amount determined by the Court. The injunction to be recommended to the Court by the Special Master will contain this additional provision for payment by the CWA Defendants of the reasonable value of the services rendered by counsel and any expert for the Plaintiffs, rendered in the monitoring process mentioned above.

d. *The basic form of Activity Report designed by Dr. Bryant as further refined in form but not in substance is, prima facie, proper for use in the new system.*

Dr. Bryannt testified in regard to how he personally prepared the format of an Activity Report for use in the

new system and then turned that form over to his staff and to counsel for the CWA Defendants for suggestions and comments. Various exhibits attached to the Westat Report indicate the tentative results of Dr. Bryant's work on the format of the Activity Report with certain modifications. The work on the format of the Activity Reports continued and counsel for the CWA Defendants indicated the completed draft with modifications on page 31 of their Supplemental Hearing Brief.

For the reasons stated in Note 2 on page 14 of this Supplemental Report, the draft presented in the Brief of the CWA Defendants is not part of the record; the Special Master however, has concluded that the modifications in that form of Activity Report are not substantially different in effect from the Activity Report forms which are on the record and, prima facie, may be used in the new system. Any difficulties which may arise from its use will most likely appear during the monitoring procedure and in the course of the operations of the new system.

3. *In what manner, if at all, may the computation procedure be made self-executing in order to compensate for future changes in Union policies?*

As the new proposed system of the CWA Defendants described above indicates, it cannot be self-executing but will require careful and frequent monitoring with the protections to the Plaintiffs above set forth. It is contemplated that the reports derived from the operation of the new system will be made within a reasonable time after the end of the CWA fiscal year, ending March 31 so that consideration by the Court of the proper determination of retainable and non-retainable expenses should hopefully be limited at the most to an annual consideration.

4. *How should the final injunction be framed in order to accomplish the object set forth in this Order and the prior Orders in this action.*

Counsel for the Plaintiffs and for the CWA Defendants have suggested the contents of a permanent injunction. These suggestions have been helpful to the Special Master, but he will set forth the provisions of his recommended permanent injunction when he modifies his Conclusion of Law No. 5 on page 41 of the Original Report. This modified Conclusion of law will supply the answer to question or issue No. 4.

5.

The Plaintiffs' Request for the Allowance of Attorneys' Fees not decided by the Special Master, Without Prejudice to Present their Request to the Court

The Plaintiffs, in their Brief, request the Special Master to award them reasonable attorneys' fees because of alleged bad faith and oppressive conduct by counsel for the CWA Defendants in the course of litigation. They rely upon *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) and *Rolax v. Atlantic Coast Line R.I. Co.*, 186 F.2d 473 (CA4, 1951).

Unlike the English Rule in regard to the allowance of attorneys' fees, the American Rule is that such fees will ordinarily not be allowed unless there has been "*bad faith*" or "*oppressive conduct*" on the part of the party against whom the award of attorneys' fees is made, and this may occur during the course of the action.

A substantial part of the alleged "bad faith" and "oppresive conduct" is stated to have occurred in a series of misrepresentations of counsel for the CWA Defendants before the Court in order to obtain the recommittal of

the case to the Special Master although some alleged misrepresentations are stated to have occurred at the hearings before the Special Master to prolong those hearings.

The Plaintiffs also state in their Brief in Note 512 on page 108 that "Plaintiffs will leave other possible bases for an award of attorneys' fees to presentation to the District Court post judgment."

Inasmuch as the principal grounds for the alleged "bad faith" and "oppressive conduct" occurred before the District Court prior to the Order of January 19, 1981, and with the indication that the Plaintiffs may present other possible bases for an award of attorneys' fees post judgment, the Special Master has concluded that he should not rule upon the request of the Plaintiffs of attorneys' fees, but leave this matter to the District Court without prejudice from the decision of the Special Master not to pass upon this issue.

Findings of Fact

1. The Special Master reaffirms Findings of Fact Nos. 1-7, inclusive, appearing on page 40 of the Original Report.

2. No facts have been presented in the hearings in Phase II which, at the time of the filing of this Supplemental Report, change the percentage of 19 percent of the total permissible or retainable expenditures or of 81 percent of impermissible or non-retainable expenditures of the CWA Defendants as calculated on Schedule E attached to the Original Report as found by the Special Master in Findings of Fact Nos. 6 and 7 in the Original Report.

Conclusions of Law

The Special Master, in addition to the Conclusions of Law made by the Court, submits the following Conclusions of Law:

1. The Special Master reaffirms and incorporates here the Conclusions of Law Nos. 1, 2, 3 and 4 set forth on page 41 of the Original Report.

2. In *addition* to Conclusion of Law No. 4 appearing on page 41 of the Original Report, the Special Master presents the following Conclusion of Law:

4-A. CWA must refund to the Plaintiffs in Schedule F attached to the Original Report, in addition to the amount payable to them as provided in Conclusion of Law No. 4 on page 41 of the Original Report, 81 percent of the amounts paid by them to CWA as Agency Fee Payors from the time of filing of the Original Report on August 18, 1980 and the date of filing of this Supplemental Report to and including July 31, 1981 as the Plaintiffs may establish and a monetary judgment for those amounts should be entered by the Court in addition to the amounts mentioned in Conclusion of Law No. 4 on page 41 of the Original Report. The CWA Defendants shall pay such amount found to be due to the Plaintiffs into, and hold in, an interest-bearing escrow account, and in addition, shall pay at the end of each fiscal year of CWA subsequent to the filing of this Supplemental Report, the portion of the agency fees paid by each Plaintiff during each succeeding fiscal year, an amount equal to twice the amount determined in the previous fiscal year to be non-retainable, all pending the determination called for in Conclusion of Law No. 5, *infra*.

3. The Special Master adds, as a result of the testimony, exhibits, authorities cited and arguments made by counsel for the respective parties, the following additional Conclusion of Law:

4-B. The new system of CWA cost accounting, time-keeping and record-keeping, subject to the changes and additions recommended by the Special Master on page 45 of the Supplemental Report are, prima facie, a proper means for the CWA Defendants to seek to meet the

burden of proof to which they are now subject by virtue of the prior holdings of the Court and of the Special Master in the Original Report for determining the percentage of agency fees paid by the Plaintiffs as Agency Fee Payors that is retainable by CWA and the percentage which is not retainable.

4. The Special Master modifies Conclusion of Law No. 5 on page 41 of the Original Report to read as follows:

5. Plaintiffs listed in Schedule F attached to the Original Report are entitled to a permanent injunction restaining CWA, its officers, agents and employees from charging or collecting and from attempting to charge and collect from the Plaintiffs for the period of August 1, 1981 to March 31, 1982 and for each fiscal year of CWA thereafter, the amount certified as non-retainable by an independent Certified Public Accountant commissioned by the CWA Defendants who has used the new system of record-keeping and allocations designed by the experts of CWA as set forth on page 43 of this Supplemental Report after supplying certain defects and omissions set forth on pages 45 and 46 of this Supplemental Report and subject to the additional provisions for monitoring set forth on pages 46 to 48 of this Supplemental Report. The Plaintiffs through their counsel and an expert or experts selected by him shall have the right upon the issuance of such report to review the workpapers of the Certified Public Accountant and of the time recording and sampling expert who prepared the report, and who monitored the operation of the new system during the period involved. If, within 45 days from the date on which the Plaintiffs have been granted access to those papers as above provided, counsel and the experts of the Plaintiffs disagree with the methods used in the preparation of and the conclusions stated in the report, they shall file with the Court a statement indicating the basis of such disagreement. If no such statement is filed, the CWA Defendants on the 46th day after

the issuance of the report shall pay to the Plaintiffs the amount stated in the report. If such a statement is filed, the Court on the papers or after such hearing as the Court may deem proper shall determine the non-retainable amount. The CWA Defendants shall each fiscal year hold in an interest-bearing escrow account a portion of the agency fees paid by each Plaintiff equal to twice the amount determined in the previous fiscal year to be non-retainable pending the determination above set forth. The CWA Defendants, as part of the monitoring expense for their new system, shall pay to the Plaintiffs an amount representing the reasonable value of the services of counsel and the experts of the Plaintiffs in connection with the review from time to time as above set forth. If the parties cannot agree upon the amount to be paid for such services, the Plaintiffs may submit by motion the question of the amount of such reasonable compensation to the Court for determination, which, after hearing the CWA Defendants, will award a monetary judgment to the Plaintiffs for the amount determined by the Court.

6. The Special Master reaffirms and incorporates here Conclusion of Law No. 6 as set forth on page 41 of the Original Report and in addition thereto adds the following:

All taxable costs which have occrued in the case since the filing of the Original Report on August 18, 1980 and the date of the filing of this Supplemental Report shall be paid 81 percent by the CWA Defendants and 19 percent by the Plaintiffs.

7. The Special Master reaffirms and incorporates here Conclusion of Law No. 7 as set forth on page 42 of the Original Report.

8. The Special Master does not decide the request of the Plaintiffs for the allowance of counsel fees for the reasons set forth on pages 49-50 of this Supplemental

Report and without prejudice to any proceeding in the Court upon this issue from the decision of the Special Master not to pass upon this issue.

Recommendations by the Special Master to the Court

The Special Master recommends to the Court that:

1. This Supplemental Report, as well as the Original Report, be adopted and the aforegoing Findings of Fact and Conclusions of Law, as well as the Findings of Fact and Conclusions of Law in the Original Report, except as such Conclusions of Law shall have been modified or amplified by the Conclusions of Law in this Supplemental Report, be adopted, applied and confirmed by the Court.

2. In view of the length of this Supplemental Report of the Special Master and the substantial number of issues, exhibits and pages of testimony involved, the time within which the parites may file exceptions, if any, to the Supplemental Report be enlarged from the ten-day period provided for in Federal Rule 53(e)(2) to thirty days from the date of filing the Supplemental Report in the Court. A form of suggested order is submitted herewith for the recommended extension of time.

Respectfully submitted,

/s/ Wilson K. Barnes
WILSON K. BARNES
Special Master

Dated: September 14, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. M-76-839

HARRY E. BECK, JR., *et al.*,
Plaintiffs

v.

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
Defendants

ORDER OF COURT EXTENDING TIME FOR FILING EXCEPTIONS TO REPORT OF SPECIAL MASTER

Upon the recommendation of the Special Master in his Supplemental Report filed in this Court on September 14, 1981, it is this — day of September, 1981, by the United States District Court for the District of Maryland, *Ordered*, that the ten-day period provided for in Federal Rule 53(e)(2) for the filing by the parties of exceptions, if any they may have, to the Supplemental Report of the Special Master be and the same is hereby enlarged to thirty days after the date of the filing of that Supplemental Report.

United States District Judge

SUPPLEMENTAL REPORT EXHIBIT NO. 1

LAW OFFICES

KANE, KOONS AND FITZGERALD
1100 Seventeenth Street, N.W.
Washington, D.C. 20036
202-659-2044

June 6, 1980

Honorable Wilson K. Barnes
Hall, Steinmann and Fronk, P.A.
Ten East Baltimore Street, Suite 1212
Baltimore, Maryland 21202
Re: *Beck* v. *CWA*

Dear Judge Barnes:

Regarding the allowability of administrative expenses applicable to each category of expenditures, Mr. Beans' analysis and attachments 1 through 4 to the National's brief allocate the administrative or overhead costs from the right hand column among the activity categories in proportion to direct costs. Therefore to the extent that you might find any activity or class of activities not chargeable to plaintiffs, the same share of direct and indirect costs should be eliminated.

No overhead was allocated to the Defense Fund or to affiliation dues (AFL-CIO and PTTI) and local subsidies. If you should find the Defense Fund not chargeable to plaintiffs, their dues should be reduced by a flat 50 cents per month, the amount of the per capita monthly assessment from each dues payer to the Defense Fund. Should you find the affiliation dues and local subsidies not allocable, the plaintiffs' dues should be reduced by the appropriate percentages shown on attachment 1.

As for the local unions, I have reorganized the expenditure line items on Exhibit 5 into their respective classifications, e.g., class 1 includes all expenditures from each

local which CWA considers to fall clearly within the ambit of "collective bargaining, contract administration and grievance handling." The percentages shown are the percentages of that class of activity attributable to each line item. For example, in Local 2100, of the Local's total expenditures on class 1 activities during the sample periods, 52.2% was for grievances. According to attachment 4, page 3, 51% of that Local's total expenditures was for class 1 activities. To calculate the amount of total expenditures attributable to "grievances," multiply 51% x 52.2% = 26.62% of total local expenditures.

CWA has proposed that local administration costs be charged as ordinary and necessary business expenses and charged as direct costs to the plaintiffs. Should you conclude that any line item is not properly chargeable, that proportionate share of the administrative costs should be eliminated. Should you conclude that a proportion of the administrative costs attributable, e.g. to political activities should not be chargeable, then the same proportion of total class 5 costs should be eliminated as the political costs bear to total expenditures. For example, in Local 2108, if political costs were disallowed equal to 1.9% of total expenditures, administrative costs should also be reduced by 1.9%, resulting in an additional reduction in total cost of .97% (1.9 x 51.5) and a total reduction in total cost of 2.87% (1.0 + .97%).

I hope this has helped and not muddied the waters more. I will be in the office until mid-afternoon Monday, June 9, when I leave for the CWA Convention in Los Angeles. I will return on June 20. If anything additional is needed during this period, my office can contact me.

Very truly yours,
/s/ Matthew A. Kane
MATTHEW A. KANE

MAK:dg
Enclosure

Supplemental Report Exhibit No. 2

CLASSIFICATION OF LOCAL EXPENDITURES

EXPENDITURE	%	February, May August 1979 2100	%	FY 1978 2101	%	FY 1979 2108	%	FY 1979 2110
CLASS 1—Collective Bargaining, Contract Administration, Grievance Handling								
President			19.6	7,975.72	21.0	22,553.60	23.4	14,092.80
Convention			.8	319.02	.55	563.84		
District & State			.8	319.02	.55	563.84		
Pres. Conf.			1.6	638.04	1.1	1,127.63	1.5	880.80
Secretary Treasurer							4.6	2,761.20
Executive Vice President					17.4	18,685.84	4.3	2,594.80
Job Pressures Day							1.1	678.00
Telephone			7.4	3,002.08	5.4	5,776.97	2.9	1,723.00
Postage			7.3	2,994.50	3.7	3,973.95	4.3	2,597.36
Hall Rental	2.8	430.00	.6	225.00			1.6	960.00
Convention Expense			18.1	7,364.83	7.2	7,697.82	2.6	1,564.93
Grievances	52.2	7,966.43	8.5	3,448.93				
Education	25.6	3,907.41	9.6	3,934.60	6.5	6,955.26	7.5	4,553.59
President's Conf.	4.3	645.00	.6	232.53				
District Meetings	2.5	383.50	4.7	1,924.72			6.9	4,188.86
Safety Comm.			4.5	1,850.23	1.1	1,180.15		
Stewards Tr. (new)			.8	352.29	3.9	4,207.08	.8	474.15
Newsletter	10.8	1,641.30	2.3	932.98	(see publications)		14.5	8,742.15
Strike Comm.			.8	304.32				
Stewards Meeting Costs	1.8	280.00	.2	93.31			5.5	3,307.70
Steward Apprec.			5.2	2,138.00				
State Meetings			2.9	1,175.66				
Area Meetings			1.2	471.55				
Area Meeting Exp.			.3	123.35				
Miscellaneous			1.8	725.84	20.4	21,866.67	18.4	11,099.54
Legal fees			.4	154.88	3.7	4,000.00		
Printing and Publication					7.5	8,054.35	.1	79.11
TOTALS, Class 1		15,253.64		40,701.40		107,206.99		60,297.98
CLASS 2—Legislation								
Lobbying			5.3	391.02	10.7	563.84	5.3	146.80
Legislation	100.0	1,192.62	94.7	5,720.69	89.3	4,700.69	94.7	2,616.76
TOTALS, Class 2		1,192.62		6,039.71		5,264.53		2,763.56
CLASS 3—Community Service								
Community Service			7.5	797.55			15.7	176.16
Legal fees			11.7	1,250.00				
Gifts and contributions	100.0	727.50	5.6	602.48	58.4	3,654.15	56.2	629.00
Community Services			33.3	3,552.48			28.1	313.96
Wk. Comp. Comm.			1.4	143.84				
Union Label			38.1	4,069.04	41.6	2,604.23		
Art & Culture			2.4	257.62				
TOTALS, Class 3		727.50		10,673.01		6,258.38		1,119.12

CLASSIFICATION OF LOCAL EXPENDITURES

EXPENDITURE	%	February, May August 1979 2100	%	FY 1978 2101	%	FY 1979 2108	%	FY 1979 2110
CLASS 4—Political COPE			100.0	556.10	100.0	5,139.60	100.0	488.00
TOTALS, Class 4				556.10		5,139.60		488.00
Class 5—Local Administration								
Other salaries			5.1	5,582.85	2.0	2,819.22		
Secretary-Treasurer			3.2	3,516.37			11.6	2,245.50
Executive Vice President					5.7	8,008.22		
Officers' Expenses			2.84	3,094.71	11.5	15,377.89		
Taxes paid—Federal			24.22	26,406.27	28.8	40,163.18	20.8	4,027.00
Unemployment			1.45	1,579.39	2.3	3,207.90		
State taxes			4.99	5,435.70	6.2	8,690.77		
Janitor			.4	390.00				
Office Supplies	6.3	703.58	1.43	1,556.92	3.1	4,377.02	1.6	307.32
Equipment Lease							.3	66.02
Audit			1.9	2,050.00	2.7	3,757.50	4.0	775.00
Mortgage—Rent			8.8	9,631.80	9.4	13,181.06	19.1	2,691.00
Election Committee	2.0	224.00	.6	646.61				
Real estate taxes			3.74	4,082.02				
Office Equipment			3.4	3,743.17			4.3	836.00
Insurance			3.07	3,343.03	2.6	3,715.16		
General Admin.	86.7	9,680.93	7.65	8,338.12				
Office Equipment and Repair			.04	45.00	.9	1,228.94		
Building maintenance			2.6	2,814.54				
Clerical Sal. & Benefits			14.94	16,284.24	15.3	21,390.78	38.3	7,412.81
Audit Comm			.97	1,057.82				
Executive Board Meetings	5.0	561.20	2.54	2,763.73				
Purchases			3.12	3,396.09	7.8	10,898.64		
Utilities			3.0	3,274.06				
Building Fund					1.7	2,400.00		
TOTALS, Class 5		11,169.71		109,032.44		139,216.10		19,360.66
CLASS 6—Organizing								
Organizing			100.0	270.94	100.0	1,095.00		
TOTALS, Class 6				270.94		1,095.00		
CLASS 7—Social & Recreation								
Entertainment & Social			46.3	1,494.39	100.0	5,755.59	100.0	650.51
Retirees Club			40.8	1,315.42				
Meeting Refreshments	100.0	1,025.19	12.9	414.76				
TOTALS, Class 7		1,025.19		3,224.57		5,755.59		650.51

Deb 4 9.

Communications Workers of America, AFL-CIO

Expense Apportionment System

major accounts apportioned by time and activity codes study

METHODS 1, 2 & 5*

(ALL CAPS-non-differential costs)

PRESIDENT
GLENN E. WATTS

Exec. Asst. to Pres.
Beaumont

Asst. to Pres.
Fryman
Easterling

Public Employees
Schultz

Adm. Asst. to Pres.
Mendoza

Communications System
Confer
Scally

Ethnic Affairs
Clark

Womens Activities
Foreman

International Affairs
Moore
024

SECRETARY-TREASURER
LOUIS B. KNECHT
Webb
Gee
Shepperson
Hassen
025*

*see chart 2

Development & Research
Straw
Bliss
Foged
Goff
Heckscher
Hunt
Kohl
Novotny
Williamson
027

Organizing
Muscat
Cervantes-Gautschi
Margolies
Tanner
028

Independent Telephone
Browning
Howard
020

Public Affairs
Weisman
Kent 045*

CWA NEWS (ED)
Miller 035*

*see chart 2

EXECUTIVE VICE PRESIDENTS

JOHN C. CARROLL
Kocis
Contract Section
Atkins
Murrill
Wolf
085

JAMES B. BOOE
Hippie 086
Legislation
Bowen
Gerber
J. Morgan
Lobie 023

M.E. NICHOLS
Ferguson 087
Education
Kutstad 022
Community Services
Mays 028

NATIONAL BARGAINING UNITS

WE Installation	WE Sales	AT&T Long Lines	WE Mfg.-Bell Labs
Padgett Murray 016	Bergstrom Kennedy 017	Pierson Irvine 018	Price Talarico 021

District 4	District 5	District 6	District 12
HUGHES Staff 04	BUTTON Staff 05	LOVETT Staff 06	GRAY Staff 012

District 7	District 8	District 9	District 11
HAYWOOD Staff 07	MAULS Staff 08	MOTTS Staff 09	DEMENS Staff 011

District 1	District 2	District 3	District 10
DAHR Staff 01	STACK Staff 02	PORCH Staff 03	BOSHTO Staff 010

APRIL 1981

Supplemental Report Exh. A.T. No 2

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Communications Workers of America, AFL-CIO

Expense Apportionment System

other major accounts

METHOD 3
DIRECT IDENTIFICATION

100% Retainable

- Bargaining Councils — 043
- Contract Reports & Ratifications — 058 & 078
- Local Subsidies — 074
- Contract Agreement Printing — Expense Code 1301

100% Non-Retainable

- Citizenship Fund — 028 & 082
- Contributions — 030
- Affiliation Dues — 039
- Foreign Affairs — 047
- Bakna Fund — 081

METHOD 4

Direct Apportionment (Specific Analysis)

- Committees & Conferences (Topic&Activity) — 034
- * CWA News (Exc. Editor) (Content) Expense Code 1401, 1402 & 036
- *Public Affairs (Contract Services) — 045
- Education Programs (Content) — 048
- Strike & Defense Funds (Activity) — 050 & 053

METHOD 6

Administrative

- *Secretary-Treasurer (Admin.) — 026
- Conventions (Inc. Committees) — 032
- Executive Board — 033
- Insurance (Exc. Employee Benefits) — 037
- Taxes (Exc. Payroll & Real Estate) — 038

DIRECT IDENTIFICATION AS ORGANIZING

Organizing

- Organizing Fund — 075
- District Organizing — 099

- Professional Fees (Services) — 056
- Legal (Billings) — 031

APRIL 1981

ADMINISTRATIVE

1120-1129 PART TIME SALARY
1210-1219 PART TIME TRAVEL
1510-1511 RENT MEETING ROOMS
1300-1304 SUPPLIES & PRINTING (EXCL. 1301)
1400 POSTAGE, EXPRESS & FREIGHT
1430 CONTRACT SERVICES (EXCL. PUBLIC AFFAIR
1602-1609 OTHER EXPENSES

BEST AVAILABLE COPY

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. M-76-839

HARRY E. BECK, JR., *et al.*,
Plaintiffs

v.

COMMUNICATIONS WORKERS OF AMERICA (CWA), *et al.*,
Defendants

REPORT OF WILSON K. BARNES, SPECIAL MASTER

Order of Reference to Special Master
Dated May 3, 1979

Report filed August 18, 1980

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IN THE UNITED STATES DISTRICT COURT
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Civil No. M-76-839

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REPORT OF SPECIAL MASTER

On May 3, 1979, the Honorable C. Stanley Blair, United States District Judge (now deceased)[1] passed an Order appointing Wilson K. Barnes as Special Master in this case pursuant to Rule 53 of the Federal Rules of Civil Procedure. In the Order of Appointment of May 3, 1979, the District Court granted the Special Master the following powers:

> ". . . The special master shall exercise those powers conferred by this court and Rule 53 in making findings of fact and conclusions of law with respect to the amount of the agency fee paid by each of the named plaintiffs to the defendants since January 1, 1976 which is not allocable to (1) collective bargaining, (2) contract administration, and (3) grievance adjustment, all in accordance with the conclusions of law heretofore reached by the undersigned judge in this proceeding. The parties shall bear the expenses of this reference including the fee of the special master in such amounts and in such proportions as

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[1] This case has been assigned since Judge Blair's death to the Honorable James R. Miller, Jr., United States District Judge.

may be assessed by the court after recommendation by the master."

The Court, subsequent to the Order of May 3, 1979, has not restricted the powers of the Special Master covered by Rule 53 in regard to rulings on the admissibility of evidence or otherwise.

The Court in its Memorandum and Order of January 13, 1979 summarized the prior proceedings in the case, indicating that the plaintiffs were twenty individuals engaged by various Maryland subsidiaries of American Telephone and Telegraph Company (AT&T) and the Chesapeake and Potomac Telephone Company (C&P) and were subject to collective bargaining agreements between the employers and the defendant union, Communication Workers of America (CWA).

The plaintiffs are not members of CWA or of any labor organization, but are "agency fee payors" required to pay to CWA as a condition of employment, an amount equal to periodic union dues and assessments, so that they would not share in benefits obtained by collective bargaining without sharing the cost.

The Court noted that this "agency shop" arrangement is not prohibited by Section 8(a)(3) of the Taft-Hartley Act, 29 U.S.C. Sec. 158(a)(3) and has consistently been upheld by the Supreme Court of the United States, citing *NLRB v. General Motors Corp.*, 373 U.S. 734, 735 (1953); *Oil, Chemical & Atomic Workers International Union, AFL-CIO v. Mobil Oil Corp.*, 426 U.S. 407, 409, 96 S.Ct. 2140, 48 L.Ed. 2d 736, (1976).[2]

In the present action, the plaintiffs do not challenge the validity of the agency shop but seek, *inter alia*, to

---

[2] Section 14(b) of the National Labor Relations Act permits individual States to prohibit such union-security agreements, 29 U.S.C. Sec. 164(b) and this section has been sustained by the Supreme Court, but Maryland has not done this.

enjoin the enforcement of the agency shop provision in the Contract insofar as the fees collected from the plaintiffs are allegedly used for non-collective bargaining purposes. They allege in substance that their coerced payments are used to support lobbying efforts and political campaigns which the plaintiffs oppose in violation of the right of the plaintiffs under the First Amendment to the Constitution of the United States to express themselves freely and without prior restraint. Indeed, the plaintiffs oppose the expenditure of agency funds for *any* purpose not directly related to collective bargaining, contract administration and grievance adjustment, not only those expenditures primarily political in nature. They oppose, for example, expenditures for union social functions, maintenance of strike benefit funds and scholarship funds among other expenditures. In Note 3 of the Memorandum of January 12, 1979, the Court stated:

> "This court reserves for decision at a later date the question whether the Union may spend the plaintiffs' fees for any or all of the non-collective bargaining purposes complained of, noting that there does appear to be, in the decisions of the Supreme Court on the subject, a gray area between expenditures for 'political purposes' which are clearly impermissible and expenditures for 'collective bargaining, contract administration, and grievance adjustment,' which are, of course, permissible. *Compare* Internat'l Assn. of Machinists v. Street, 367 U.S. 740, 774-75 (1961) and Bhd. of Ry. and S.S. Clerks, Freight Handlers, Express and Station Employees v. Allen, 373 U.S. 113, 121 (1963) *with* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 225-26 and 236 and n. 33 (1977)."

The Court observed that the Supreme Court has suggested that labor unions might avoid infringing on the First Amendment rights of the agency fee payors by establishing internal procedures for determining what

proportion of the union budget was allocated to political purposes and refunding the proportionate amount to them and excusing them from "contributing" that amount in the future, citing *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees v. Allen*, 373 U.S. 113, 122-23, 83 S. Ct. 1158, 10 Ed. 236 (1963); *International Association of Machinists v. Street*, 367 U.S. 740, 774-75, 81 S. Ct. 1784, 6 Ed. 2d 1141 (1963); and *Abood v. Detroit Board of Education*, 431 U.S. 209, 234, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977).

CWA has established an internal procedure, but the Court held that the plaintiffs were not required, in this case, to exhaust the possible rebate procedure for the reasons set forth in the Court's Memorandum of January 12, 1979, and denied CWA's motion for a stay pending exhaustion of such internal union procedure in that such exhaustion of a possible remedy would not promote settlement and would cause unnecessary delay.

The Court also observed that in *Allen*, the Supreme Court indicated that the union which collects and disburses the agency fees bears the burden of determining the correct proportion of political expenditures which the agency fee payor may recover, stating:

> "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion."
>
> 373 U.S. 112, 83 S. Ct. 1163.

In the Court's Memorandum and Order of March 16, 1979, it was provided:

> "In this case it is undisputed that the defendant union, CWA, has negotiated an 'agency shop' clause

with the plaintiffs' employers which allows the union to collect dues-equivalent payments from the plaintiffs. *See* Exhibits A-1 and A-2 to the Complaint. It is also clear that the plaintiffs object to the expenditure of their funds for purposes other than 'collective bargaining, contract administration and grievance adjustment.' Finally, it is undisputed that CWA has spent and continues to spend an as yet undetermined fraction of its dues receipts and dues-equivalent agency receipts for purposes other than the three enumerated ones.

"Thus it appears that the plaintiff agency-fee payors are entitled to a declaratory judgment that exaction of fees for activities other than 'collective bargaining, contract administration and grievance adjustment' is improper, a decree ordering restitution of the amounts improperly collected by the union in the past, and an injunction against future collection of amounts authorized by the agency shop clause in excess of the amount necessary for the three enumerated purposes. *Allen, supra*, 373 U.S. at 122; *Street, supra* at 774. This relief necessarily requires a determination of what proportion of the union's total expenditures is attributable to activities other than collective bargaining, contract administration and grievance adjustment. *Street, supra*, 367 U.S. at 775; *Allen, supra* at 121. The burden of proving such proportion rests upon the union, but 'absolute precision in the calculation of such proportion is not, of course, to be expected or required,' *Allen, supra* at 122.

"Accordingly, it is the judgment of this court, to be set forth separately by the Clerk as required by Fed.R.Civ.P. 58, that:

"(1) Pursuant to the agency shop clause in its collective bargaining agreement with plaintiffs' employers, the defendant, CWA, has collected and con-

tinues to collect from the plaintiffs amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment;

"(2) That such collection by the defendant violates the first amendment rights of the plaintiffs;

"(3) That the parties may agree upon the percentage of the defendant's budget disbursed for purposes other than the three permissible ones;

"(4) That if, at the expiration of thirty (30) days from the date of this Order, the parties remain unable so to agree, then, pursuant to Fed.R. Civ.P. 53, the matter will be referred to a master of the parties' own choosing;

"(5) That if, at the expiration of ten (10) days from that date, the parties are unable to agree upon a master, then this court will appoint a master;

"(6) That in the event of reference to a master, of either the parties' or the court's choosing, if the parties are unable to agree upon an equitable allocation of the costs of the reference, then this court will direct the master to make findings of fact and recommendations with respect to the apportionment of costs as between the parties which the court may adopt;

"(7) That when it has been determined what portion of the agency fees the defendant has collected improperly, the defendant is to refund to each plaintiff for every year since January 1, 1976 an amount reflecting that portion of his dues-equivalent agency fees which was spent for purposes other than collective bargaining, contract administration and grievance adjustment; . . ."

The parties not having agreed upon a Special Master to be appointed, the Court, on May 3, 1979, pursuant to Rule 53, Fed. R. Civ. P., passed the following Order:

". . . the court, acting pursuant to Rule 53, Fed.R. Civ.P., hereby appoints as a special master the Honorable Wilson K. Barnes, retired Associate Judge of the Maryland Court of Appeals. The special master shall exercise those powers conferred by this court and Rule 53 in making findings of fact and conclusions of law with respect to the amount of the agency fee paid by each of the named plaintiffs to the defendants since January 1, 1976 which is not allocable to (1) collective bargaining, (2) contract administration, and (3) grievance adjustment, all in accordance with the conclusions of law heretofore reached by the undersigned judge in this proceeding. The parties shall bear the expenses of this reference including the fee of the special master in such amounts and in such proportions as may be assessed by the court after recommendation by the master."

The Special Master began the proceedings before him in this case by a Conference with counsel on May 15, 1979.

The case has proved to be a rather formidable one. There have been 27 actual hearing days for the taking of testimony, and one full day for argument of counsel. The number of pages of testimony has amounted to 3,844. There have been in excess of 2,100 documentary exhibits, some containing subdivisions a, b, c, etc.

Counsel for the parties and the Special Master were able to agree at the beginning of his service upon the basis of the Special Master's compensation, to be paid monthly in equal shares by the respective parties and the total compensation as thus agreed upon to be apportioned by the Court, after considering a recommendation by the Special Master.

During the course of hearing testimony, there were a number of objections to the admissibility of testimony.

The Special Master sustained the objection of the Plaintiffs in regard to the admissibility of one document; all of the other documents, papers and testimony to which objections were made, were taken subject to exception with leave to the objecting party to move to strike out such testimony or documents at the end of the case. Neither party exercised that right. But, there was, however, a Motion to Strike certain testimony of a witness before the end of the case, the Special Master reserving his ruling on that Motion until the end of the case. The Motion is now overruled, so that all the testimony and documents admitted into evidence subject to exception are now evidence in the case.

On September 26, 1979, upon a Motion by the Plaintiffs, pursuant to F.R. Exid. 106, the Special Master passed an Order in Limine, as follows:

> "(1) Plaintiffs cannot introduce testimony or evidence that CWA's activities do not benefit them; CWA cannot introduce testimony or evidence that its activities do benefit Plaintiffs;
>
> "(2) Plaintiffs cannot introduce testimony or evidence that CWA's costs of collective bargaining, contract administration and grievance adjustment are unreasonable; CWA cannot introduce testimony or evidence that those costs are reasonable;
>
> "(3) Plaintiffs cannot introduce testimony or evidence that collective bargaining, contract administration, and grievance adjustment can be secured at less cost than CWA provides them; CWA cannot introduce testimony or evidence that those activities cannot be secured for less cost than the agency fee."

The Plaintiffs and CWA complied with this Order in Limine, and there are no issues in the case in regard to the "benefit", vel non, of CWA activities, and the "reasonableness of costs" of collective bargaining, contract administration and grievance adjustment.

Counsel for the respective parties have demonstrated to the Special Master their competence and zeal in representing their respective clients and have cooperated with the Special Master and with each other in the presentation of the case and expedition of the hearings and argument in the case.

Elaborate and helpful briefs were filed on behalf of each party and the arguments in the case were enlightening and of substantial help to the Special Master.

Turning to the role of the Special Master, it is apparent that the Court has already decided and articulated the law applicable to the case. The Special Master is, of course, bound by and must follow the Court's rulings as the law of this case.

The principal ruling by the Court as applicable to the Special Master in the formulation of his Report setting forth his conclusions on the evidence and recommendations to the Court is that CWA and the other Defendants have the burden of proving the amounts spent by them for the period January 1, 1976 to date for "collective bargaining, contract administration and grievance adjustment."

Inasmuch as the Defendants did not keep their books of account upon any theory of separation of items or amounts upon this basis, the Defendants have been presented with a most difficult task in meeting this burden of proof.

In view of the Constitutional issues involved, the burden of proof requires that the Defendants prevail, if at all, upon "clear and convincing evidence". *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52, 91 S.Ct. 1811, 1828, 29 L. Ed. 2d 296 (1971), but as the Court's Order of March 16, 1979 (relying on *Allen*) provides, the burden of proof upon the Defendants does not require "absolute precision in the calculation". The Special Master must seek to stear his course between these two concepts

in regard to the testimony and to seek to clarify the "gray area" left open by the Supreme Court in *Abood.*

CWA maintains an elaborate system of books of account with some 63 different account numbers. Although all of the separate accounts and their account numbers are important in this case, the most important ones are:

Account	Number
District 2	002
Negotiations Dept.	021
Education Dept.	022
Legislation Dept.	023
Administration	024
Development and Research	027
Legal	031

The four local unions involved in the case are all in District 2.

The Plaintiffs do not challenge the accuracy of the various figures, as such. They vigorously challenge whether various items were properly established as proper charges to CWA and the four Local Unions and whether CWA has met its burden of proof in allocating various expenditures to collective bargaining, contract administration and grievance adjustment.

As already indicated, CWA and the Local Unions did not maintain its books and records on the basis of allocating all of its expenditures between collective bargaining, contract administration and grievance adjustment, on the one hand, and all other expenditures on the other. In an effort to make such an allocation from the existing CWA books and records, the Defendants offered the testimony of Charles Robert Beans, with supporting exhibits. Mr. Beans is a Certified Public Accountant. He has been in public accounting since 1954 and became certified in 1961. He has been involved in the accounts of CWA since 1968. He and his firm audit the CWA books and prepare the

annual CPA Report on the financial operations of CWA. They also assist in the preparation of the CWA annual budget, as well as the financial reports filed with the Federal Government under the Landrum-Griffin Act. He is familiar with CWA's accounting structure and the classification of accounts.

For the purposes of this case, Mr. Beans made a study of the accounts of CWA for its fiscal year beginning April 1, 1977 and ending March 31, 1978, taking the position that this study can be used as analogous to the other periods of time involved in this case. Mr. Beans wrote a letter dated January 31, 1980, to Louis B. Knecht, Secretary-Treasurer of CWA, to which was attached a study of the accounts of CWA for the year in question. The letter of January 31, 1980, will be filed with this Report as Appendix A-1 and the attached Beans' Study as Appendix A-2. Mr. Beans testified that in his consideration of CWA activities he was guided in part by part of the answers of CWA to the Plaintiff's First Amended Interrogatories. The relevant part of those answers, consisting of 21 various categories of activities, is attached to this Report as Apendix B.

Mr. Beans was quite aware of the difficulties in the task presented to him. In regard to the 1977 and 1978 studies, he stated that he would not attach an unequivocal opinion letter to either of them, because of the lack, in part, of an adequate data base. In regard to the 1977 study, Mr. Beans stated that the study was like trying to make a "frog fly". In the opinion of the Special Master, however, parts of Mr. Beans' studies were helpful and based on data and reasonable inferences in regard to whether CWA has met its burden of proof, but others were not sufficiently established.

In considering the various items of expenditures, the Special Master has arranged them—like all Gaul—into three parts, i.e., (1) *permissible*, that is properly charged

to the Agency Fee Payors for payment; (2) *impermissible*, that is completely disallowed as chargeable to the Agency Fee Payors; and (3) *partly permissible*, that is, some proportion of the expenditures are permissible and part are impermissible, giving the percentage of the portion which is permissible.

It is interesting to note that the Reports of Main, Lafrantz & Co., Certified Public Accountants, for CWA for the years ending March 31, 1976, 1977, 1978 and 1979 (Defendants' Exhibits W1-W4), indicate on Statement 2 the amount and source of CWA Revenues, as follows:

Total Revenue from Dues		Non-Member Dues (dues equivalent)
	1976	
$20,007,064.02		$ 584,789.39
	1977	
23,167,145.84		1,332,359.38
	1978	
24,624,685.71		1,282,971.80
	1979	
26,458,984.37		1,578,610.21

For the years 1977, 1978 and 1979, the amount of Non-Member Dues was approximately 5% to 6% of the total revenue from dues, that proportion varying very little during the three years mentioned.

The Special Master does not accept the argument of CWA that substantially all of its expenditures (except the political portions from the general fund, i.e., 1.89% in 1978, 1.90% in 1979 and 1.94% in 1980) are permissible charges. This is based on the theory that the CWA expenditures for legislative purposes, for contributions and the like are "germane" to collective bargaining in that they "strengthen the hand", as it were, of the Union when actual collective bargaining procedures begin

by having a good rapport and sympathetic understanding with the public officials and the public generally. This position (with certain exceptions) was articulated by Dr. Walter Galenson, Jacob Gould Professor of Economics and Industrial Relations at Cornell University and also by Dr. Willard Wirtz, former Secretary of Labor and a member of the Bar, the two expert witnesses produced by CWA and by Glen E. Watts, the president of CWA, but the Courts have not embraced this position. On the contrary, Judge Blair in Note 3 of his Memorandum of January 12, 1979, *supra* at page 3, observes that there is a *gray area* (citing *Abood*) which indicates that not substantially all of the Union's expenditures, other than those for "political purposes", are permissible. And, see *Ellis-Falls Railway Clerks*, Civil Nos. 73-113-N and 73-118-N, Par. 11.290, Labor Relations Cases, S. Dist. of California, 1-20-76, Nielson, D.J.

One of the conceptual difficulties of CWA and many of its witnesses lies in the absence of a clear definition of "collective bargaining" within the context of this case. Indeed, as indicated, Dr. Wirtz is of the opinion that the phrase was incapable of definition. The Special Master is of the opinion, however, that "collective bargaining", as applicable in the present case, not only *can* be defined, but *has been* defined for the purposes of this case.

The National Labor Relations Act (NLRA), 29 U.S. # 158(d) states a definition of collective bargaining which is appropriate for this case. Subsection (d) provides in relevant part:

> ". . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written

> contract incorporating any agreement reached if requested by either party. . . ." [3]

This definition of "collective bargaining" is in accordance with the common understanding of those words and is in accordance with the definition of "collective bargaining" in Webster's Seventh New Collegiate Dictionary (i.e., "Negotiations between an employer and a union representative usu. on wages, hours, and working conditions").

Chief Judge Parker for the United States Court of Appeals for the Fourth Circuit in *United Construction Workers and United Mine Workers of America v. Haislip Baking Co.*, 223 F.2d 872, 877 (1955)—a case arising under Section 301 of the Labor Management Relations Act, 29 USC # 185(a)—stated:

> "Collective bargaining, however, has the well understood meaning in the law of settling disputes between employer and the representative of the employees."

See *Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 547-549, 57 S. Ct. 592, 599-600, 81 L.Ed. 789 (1937, unanimous opinion for the Supreme Court by Stone, J.) involving the Railway Labor Act, as amended, 45 U.S.C. ## 151-163.

In the opinion of the Special Master, the Defendants in order to charge the Agency Fee Payors for an expenditure for collective bargaining are obliged to establish that the claimed expenditure is reasonably within the parameters of the definition above set forth.

"Contract administration" is reasonably well defined and "grievance procedure" is likewise reasonably well established not only by the meaning of the words them-

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[3] This statutory statement in regard to collective bargaining was not changed or modified by the amendment of Subsection (d) by the Act of July 26, 1974, Public L. 93-360, #1(C)-c).

selves, but also by the established and well-understood procedures under these hearings. Here too, the Defendants are obliged to establish that claimed expenditures under these two headings are within the scope of "contract administration" and "grievance adjustment" as understood and established.

No case has been called to the attention of the Special Master and his own research has not disclosed any case which establishes a rule or guide by which an expenditure in the "gray area" can be determined to be permissible, impermissible or partly permissible. Dr. Wirtz indicated that in his opinion, such a determination must be made *ad hoc* on a case-by-case basis and that it is impracticable, if not impossible, to fashion an applicable rule or guide. In short, the trier of fact cannot apply a rule or guide in regard to permissibility but, like obsenity, he "knows it when he sees it."

The Special Master, however, will seek to formulate a rule or guide which he will attempt to apply in the present case, i.e., that expenditures not clearly embraced within collective bargaining, contract administration and grievance adjustment, as defined, will only be permissible if such an expenditure *directly relates to* and is *reasonably necessary for the proper effectuation of*, collective bargaining, contract administration and grievance adjustment. This rule must be strictly applied in view of the First Amendment rights of the Plaintiffs inasmuch as otherwise those vital and important rights will be impaired by too broad an application of the rule. For example, the Defendants earnestly contend that their charitable contributions not only, in themselves, advance the public interest, but create a favorable climate of public sympathy and support when collective bargaining time arrives and particularly when there is a strike.

This result, while superficially plausible, has not been established by clear and convincing evidence and charita-

able contributions do not directly relate to, and are not reasonably necessary, in the opinion of the Special Master, for the proper effectuation of collective bargaining, contract administration and grievance adjustment. Again, in the context of the First Amendment rights involved, the Plaintiffs may not approve of the particular charities receiving the largess of the Union, and have by this action and otherwise, protested against this type of expenditure. Then too, the Plaintiffs may well have their own favorite charities other than the Union-favored ones, to which they may wish to contribute the portion of their agency fee payments allocated by the Union to charitable contributions. .

Turning now to the expenditures involved, it will be helpful to use the aforementioned Beans' study for the fiscal year beginning April 1, 1977 and ending March 31, 1978 (Beans Study) as a focal point for determining which expenditures are permissible those which are impermissible and partly impermissible. The figures used will generally be rounded off to the nearest $1,000.00 inasmuch as the hundreds of dollars and the cents involved will have little or no effect on the ultimate result and their elimination in the calculations will make the calculations much easier to follow.

The Beans' Study is for the fiscal year ending March 31, 1978 as already noted and was selected for the reasons already set forth. It has eight separate headings for eight separate columns of figures, i.e.: (1) Collective Bargaining, (2) Grievance, (3) Contract Administration, (4) Organizing, (5) Labor Legislation, (6) Community Services, (7) Political and (8) Administration. There are 40 separate classifications of items of expenditures. Thirty-five are listed under the heading "General Fund", to which five "Fund" classifications are added, namely, the Defense Fund, the Organizing Fund, the Citizenship Fund, the District Organizing Allocation Fund and the Contract Report and Ratification Fund. After sub-totals

are obtained for the eight separate columns, there is an apportionment of the Administrative Column total among the other seven columns.

The total expenditures for the year 1977-78 is $29,240,000. It is apparent that the first three columns—Collective Bargaining, Grievance and Contract Administration—are the classifications primarily involved in this case. The importance of the eighth column—Administration—lies in its allocation to the remaining seven columns after the subtotals are taken and especially its allocation to the first three columns.

Mr. Beans, in his work sheets, introduced into evidence, and in his oral testimony, has given his reasons for his allocations. The figures for the most part are taken from the books and records of CWA.

By the Beans Study, the first three columns amount to 86.38% of the $29,240,000 total expenditures, whereas the remaining four columns—Organizing, Labor Legislation, Community Services and Political—amount to only 13.62%, namely 6.20%, 2.27%, 3.35% and 1.77%, respectively.

The Special Master, however, has concluded, from his examination of the exhibits, his consideration and evaluation of the testimony and the inferences arising from the exhibits and testimony, that many of the expenditures allocated to the first three columns—Collective Bargaining, Grievance and Contract Administration—are either impermissible in whole or impermissible in part and, further, that a number of the expenditures allocated to the eighth, or Administrative column, are also either impermissible in whole or impermissible in part.

CWA concedes that the $376,902 of Political expenditures (Column 7, 1.77%) is "refundable to the Plaintiffs". The Special Master finds that this is an impermissible expenditure.

The Special Master also finds that the $709,574 total for Column 6, Community Services, is also impermissible. The reasons for this finding have already been stated above and need not be repeated here.

In regard to Column 5, Labor Legislation, the Special Master finds that this total of $481,000 is impermissible. Many of the items of expense listed under this classification involve lobbying efforts by the CWA lobbyists to promote legislation far remote, in the opinion of the Special Master, from collective bargaining, contract administration and grievance adjustment. For example, the CWA lobbying efforts on behalf of the adoption of the Panama Canal Treaty, and the Equal Rights Amendment, not only are not directly related, but were and are quite controversial as matters of national policy in regard to which the Agency Fees Payors might well object and for which the expenditures of any part of their Agency Fee Payments deny them their First Amendment rights. Nor are these lobbying efforts reasonably necessary for the effectuation of collective bargaining, contract administration and grievance adjustment. There may be certain legislative or administrative proposals which have some possible direct bearing on collective bargaining such as the Telecommunications Act or Occupational Health and Safety Regulations, but CWA has not met its burden of proof in demonstrating what expenditures, if any, were made in regard to that Act or those regulations. The whole classification must be held by the Special Master to be impermisssible, and he so holds.

Considering the fourth Column—Organizing—with a total of $1,313,000, here again, the Defendants do not, in the opinion of the Special Master, meet the burden of proving that the expenditures for organizing have any direct effect upon collective bargaining, contract administration and grievance adjustment, and are reasonably necessary for their effectuation. The evidence rather indicates that the organizing activities of the Defendants are

designed to increase the Union membership, but there is no evidence that such an increase would have any direct effect upon collective bargaining, contract administration or grievance adjustment, and are reasonably necessary for their effectuation. The organizing expenditures are impermissible and the Special Master so finds.

It will be noted that no part of the expenditures allocated in the Beans' Study to Columns 4, 5, 6 and 7—Organizing, Labor Legislation, Community Services and Political—were allocated later to Columns 1, 2 or 3—Collective Bargaining, Grievance and Contract Administration—and, in the opinion of the Special Master, this was proper for the reasons already stated.

Considering now, Columns 1, 2 and 3—Collective Bargaining, Grievance and Contract Administration—the Beans' Study with the supporting work sheets give the various items which make up the totals allocated to those columns. A Certified Public Accountant, Irving B. Ross, was produced by the Plaintiffs as an expert witness to analyze the Beans' Study and supporting work sheets and give his professional opinion in regard to the various items involved.

Mr. Ross is a well qualified expert. He received his Bachelor of Science Degree from the University of Connecticut in 1965 and later took courses towards a Masters Degree at American University in Washington, D.C. He became a Certified Public Accountant in 1967. He is the Senior Partner in the accounting firm of Ross, Langan and McKendrix, having some 22 persons, mostly accountants and secretaries, employed by it. He is quite familiar with the accounting methods and books of unions having been employed in connection with the litigation in *Seay, supra* (spending personally in excess of 750 man hours), in *Ellis-Falls, supra* (in which he testified as an expert witness and spent personally an estimated 1,500 man hours), and in *Ball, supra*; in which, thus far, he has

personally spent an estimated 100 man hours. In these cases, as in the present case, one of the most important issues was in regard to what expenditures by the Unions involved, were properly chargeable to agency fee payors.

In his testimony, Mr. Ross impressed the Special Master most favorably in regard to his competence, his integrity and his truhtfulness. He is found to be not only unusually well qualified as a Certified Public Accountant in the particular area of accounting involved in the present case, but also to be objective, truthful and accurate.

Mr. Ross was given for his professional consideration Mr. Beans' letter of January 31, 1980 to Louis B. Knecht, Secretary-Treasurer of CWA (Defendants Beans Exhibit # 1), together with the Beans' Study attached and Mr. Beans' work sheets supporting the letter and the Beans' Study. Attached to this Report as "Appendix A-1" is a copy of the Beans' letter of January 31, 1980, and as "Appendix A-2" the attached Beans' Study. Mr. Ross not only considered this material but also considered the Statement of Position entitled Accounting Principles and Reporting Practices for Certain Non-Profit Organizations published in December, 1978 by the American Institute of Certified Public Accountants, Accounting Division (AICPA), giving guidelines for the steps a non-profit organization should take in determining the cost or expenses by function.

Mr. Ross testified that the purpose of his review was to give his "professional opinion as to whether the classifications in the schedule can be relied upon in terms of yielding accurate results of the activities listed: namely, collective bargaining and non-collective bargaining." He used the term "collective bargaining" as also including "grievance" and "contract administration". He concluded that "there are certain deficiencies evident, based on my review and based on the procedures that were followed by the Certified Public Accountants in the course of the

engagement; and, consequently, I do not believe that generally accepted cost accounting principles were applied in coming up with these results; and, therefore, the numbers should not be relied upon as giving what I call reasonably accurate determinations of collective bargaining costs."

The first item under the hearing "General Fund" in the Beans' Study is "Districts". It represents the largest single item in the first three Columns amounting to $8,804,000, made up of $1,724,000 under Column 1, "Collective Bargaining", $3,651,000 under Column 2, "Grievances" and $3,429,000 under Column 3, "Contract Administration".

In the Beans' letter of January 31, 1980 to Secretary-Treasurer Knecht (Appendix A-1, page 2), Mr. Beans states the general basis upon which he made the District calculations and allocations. He stated:

> "Districts—The staff of *District 2* was asked to indicate which of the activities listed as activities of the Union in the 'Answer of CWA Defendants to Plaintiffs First Amended Interrogatories', Interrogatory No. 9 were included in their job responsibilities and to what extent each of the activities occupied their time.[4] Those responses in percentages of time were translated into *salary dollars* which were then used as the *basis for allocation of district costs.*" (emphasis supplied)

It will be noted that there are 12 Districts. District 2 was used as the basis for calculation of costs and allocation of the remaining 11 Districts.

The Beans' work papers supporting the Beans' Study indicate that three individuals, Messrs. Strick, Lewinski and Linder, were requested to estimate the percentage of

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[4] The relevant portions of the Answer of CWA Defendants to the Plaintiffs First Amended Interrogatories are set forth in Appendix B, hereto attached.

their time spent in 21 different activities during the period April 1, 1977 through March 31, 1978.[5] Later six additional individuals (Messrs. Angel, Dinkin, Mazzi, O'Connel, Jr., Sangmeister and Ms. O'Hara), also in District 2, were asked to go through the same procedure.

The salaries of the first three individuals were allocated by their percentages; all the District 2 expenses were allocated on the basis of the average percentage of the nine individuals (the first three plus the additional six). The overal percentage of District 2 expenses were then allocated to the 21 categories and then assigned to the first seven columns on the Beans' Study.

In the Beans' work sheets there is no reference to any time records kept contemporaneously by the nine individuals and Mr. Beans, in his testimony, indicates that no such records were kept. This was confirmed by the testimony of the nine individuals. With one exception, there is no allocation of salaries and expenses by *functions.*

Mr. Ross, in his testimony, stated:

> "I have very strong feelings and opinions regarding the Districts. My professional opinion tells me that the procedure used in distributing the cost into various categories is both inconsistent and generally lacking because of the inherent data base deficiency I will call it."

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[5] The 21 activities are: 1. Grievance up to arbitration; 2. Arbitration; 3. Administration of collective bargaining agreement; 4. Preparation and negotiation; 5. Organizing; 6. Conducting Union meetings; 7. Labor legislation; 8. Strike and picket activity; 9. Recreation and social activities; 10. Retirement, etc.; 11. Training; 12. Publications; 13. Political activities; 14. Presentation of Court activities; 15. Defense of Court activities; 16. Activities re impr. terms and conditions; 17. Reports and References to Agreements; 18. Monitoring local offices; 19. Community Affairs; 20. C.O.P.E.; and 21. Per Capita Contrib.

Mr. Ross further noted that there were extensive variations within the 21 activities, individual by individual. He also testified that there were no studies or evaluations made to support the percentage used by any of the individuals involved. There were no contemporaneous records, and no specific identification of direct costs, that is, costs directly chargeable to any one of the seven columns. There was, in effect, a co-mingling of direct costs—such as salaries—and indirect costs such as some administrative overload of the District. Furthermore, all District costs are allocated on the basis of salaries which were developed on the percentage of nine individuals without any causal or beneficial relationship between salaries and some of the other expenses incurred at the District level. The cost analysis is based on the recollections of nine individuals in one of the 12 Districts whose salaries total approximately $200,000 but which are used to allocate some $10,000,000 for the 12 Districts. Nor was there any evidence in the Beans' work sheets to support the conclusion that there was a relationship between costs in District 2 and the remaining 11 Districts.

There are well established bases which might have been used by CPAs in determining various costs, such as occupancy costs, stationery supplies and postage, set out by AICPA, but these established bases were not used in the Beans' work sheets and the Beans' Study.

There is no sufficient evidence that Headquarters personnel of CWA engage in the same activities and in the same percentages as CWA representatives. CWA has apparently "presumed" that this ratio exists, but this "presumption" was repudiated by Mr. Beans himself on cross-examination. He testified (Transcript 3-13-80, page 91):

> Q Mr. Beans, what would have been the effect of your study if, rather than taking the direct personnel

as the basic time-expense unit, you had taken the same number of Headquarters staff people?

A I don't know.

Q So there is no basis for saying that Glenn Watts' time and George Strick's time are spent on the same activities, in the same ratio?

A In that context, no.

Q And there is no basis for saying that Ed Lewinski's time and Mr. Watts' time are spent on the same activities, in the same ratio, is there?

A No, not taken in that context.

Nor do some of the officers and employees of CWA consider the retroactive attempted reconstruction of time spent by its officers and employees to be more than speculation and guesses. For example, CWA Vice President, Morton Banr observed in Exhibit 1853, at page 160, "I said this was an uneducated guesstimate." He indicated to the Secretary-Treasurer that filling out the form was "guess work" and that it was "impossible to be anywhere near accurate" in filling out the form. (Id. page 159)

Grace Ann Leonard, a witness for CWA, is a CWA representative and on its staff since October, 1972. Before 1972, she was Secretary-Treasurer of Local 2336 in Washington, D.C. She testified in regard to her participation in grievance procedures. When asked what percentage of her time was spent upon the grievance procedure, she stated: "These are going to be just estimates, because I don't keep an accurate daily log of my time, but the time spent—and this is a best estimate—I would have to say about 50 per cent, and that would include activities that I've just described, with the traveling and the internal communication with the company, and the hearing," (Testimony 2-7-80, page 12).

On cross-examination, she testified:

Q Do you keep any time records or daily logs of your activities?

A No. I wish I did.

Q And you haven't since January 1, 1976, have you?

A Kept a time record or a daily log?

Q Yes.

A No, sir.

Q And I gather from the hesitancy of your testimony that you question the accuracy of your percentages that you have given?

A Yes, I can't be sure. Because I haven't kept a record, it's hard to describe, or it's hard for me to describe the actual time or percentage of time.

Q In fact, it's well nigh impossible; isn't it?

A Yes. (Id. page 46)

On redirect testimony (by Matthew A. Kane, Esquire, attorney for CWA), she testified in respect to the 12% figure for "Administration":

"Matt, I think I would just be guessing to try to give you an answer honestly." (Id. page 64)

"I just can't be sure. It's pure speculation, Matt; I'm sorry." (Id. p. 65)

Other witnesses for CWA referred to the percentages as "guesses".

Nor was the testimony of the nine individuals used in this allocation more reassuring than that of Ms. Leonard.

Mr. Strick in referring to the various estimated percentages of time spent was often not definite, stating that the percentage was "about" the percentage given (T. 2-6-

80, pages 33, 41, 52), or was "less than" the percentage given, without stating how much less (T. 2-6-80, pages 34, 52, 53, 58 and 66).

On cross-examination, it was stated:

> "Q When you say 'estimate', you really mean 'guess' don't you?
>
> A I don't know if the two are synonymous or not. Maybe they are." (T. 2-6-80 page 98)

Here too, there were instances in which pages in his appointment calendar were blank and he was unable to state what services he performed on those blank days. (T. 2-6-80 page 100)

Mr. Lewinski, in his testimony, often stated his percentages in the alternative, such as "a good 20 or 25% of my time" (T. 2-7-80, page 18), "a good one, two percent" (Id. page 78). He also indicated that the percentage was "less" than the percentage given (Id. page 30), and that the percentage was "about" an alternative percentage (Id. 30). He also characterized his "estimates" as "guesses", stating: "I guess, overall, about 6.78 per cent of my time. It varies." (Id. page 31) and, again, "I guess about 4 or 5 per cent, totally." (Id. page 32)

Mr. Linder, testified that during the period since the fall of 1976, there had been substantial changes in his duties and activities and stated:

> "Yes, to tell you the truth, it is a rather difficult thing to do because there has been substantial change and what I attempted to do is to try to visualize a typical year because my operation, its almost a crisis-to-crisis situation, and you just don't—time gets away from you." (T. 2-7-80, page 31)

The testimony of the remaining six of the nine individuals was equally unsatisfactory.

Mr. Dinkin on cross examination stated:

> Q Now when you say those percentages on Exhibit TT represent your best estimates they are really your guess as to what transpired over the past year.
>
> A Well, I set down when I get this request—to the best of my knowledge, I went back and in my own mind estimate how I spent my time for the year, and its really not precise. I know that, but its the best estimate I could come up with." (T 2-8-80, page 30)

Mr. Mazzi, in several instances when asked about various items in connection with which he had stated in Exhibit UU he had expended time, frankly stated: "I honestly don't remember," (T. 2-8-80, pages 25, 31) or "I've forgotten the time frame." (Id. page 24).

Mr. O'Connell, in regard to the time spent by him in negotiating six contracts, stated: "Fifteen to 19 per cent, something along in there." (T. 2-8-80, page 9) He stated, in regard to several items that he spent "about" the percentage indicated. (Id. pages 12, 13, 15).

Mr. Sangmeister had difficulty in remembering various items stating "I don't remember" or "I don't recollect" a number of times. (T. 7-8-80, pages 29-30, 31, 32, 33, 34, 35, and 37).

Ms. O'Hara testified in regard to various percentages, "a very small percentage (T 2-8-80, pages 17, 22) and in regard to time spent on Grievances, stated on cross-examination:

> Q Did you write the 25 percent opposite grievances?
>
> A To the best of my knowledge, no, I did not."

The Special Master necessarily must conclude from the testimony of the nine individuals that the percentages given or attributed to them are indeed mere guesses and speculation and the salaries cannot reasonably be used as

the basis for the allocation of expenditures in this case. He so rules.

Then too, the Special Master notes that CWA did not produce as witnesses some 30 employees actively engaged in various projects for CWA.[6] There was no evidence produced that these witnesses were not available and able to testify if called. The Special Master draws the inference from this failure to produce these witnesses that their testimony in regard to their being engaged in "collective bargaining, contract administration or grievance adjustment" would have been unfavorable to CWA. See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226, 59 S. Ct. 467, 474, 83 L.Ed 510 (1939), and *International Union, (UAW) v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir., 1972).

The adverse inference drawn is supported by a number of documentary exhibits introduced by the Plaintiff indicating that most of the 30 employees mentioned in Note 6 are presently engaged in activities which are not "collective bargaining, contract administration and grievance adjustment."

The Special Master also notes that the CWA witnesses, Glenn Watts, Louis Knecht and James Gee all testified without being asked to qualify their time spent upon CWA projects.

The Special Master accepts the opinions and observations of Mr. Ross in regard to the District items. These

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[6] The 30 employees not called are:

James Booe and his working team, Loretta Bowen, Gerber, M. Miller, Morgan and Sisson; Patsy Fryman and her working team, Clark, Foreman, Kulstad and Mays; John Carroll and his working team, Abraham, Atkins, Burch, Foged, Kent, Miller, Stadelmyer, Straw and White; those working under the Secretary-Treasurer, Knecht, i.e. Webb, Shepperson and Hassen; Executive Vice Presidents Cramer, Miller and Hackler and their assistants Hipple, Ferguson and Confer.

opinions and conclusions, together with the other relevant testimony and exhibits, the failure to produce the testimony of certain witnesses by CWA and the reasonable inferences to be drawn therefrom, have lead the Special Master to conclude that the Defendants have not met their burden of proof in regard to the expenditures under the heading "Districts", and he is of the opinion that no part of such expenditures under the heading "Districts" set forth in the Collective Bargaining, Grievance and Contract Administration columns in the Beans' Study are permissible charges and holds that they are impermissible.

W. E. Installation; W. E. Sales and Long Lines

Under the "Collective Bargaining" column, Mr. Beans has allocated $33,970 for "W. E. Instalaltion"; $27,749 for "W. E. Sales" and $31,969 for "Long Lines", a total of $93,688. Under the column "Grievances", he allocated $56,616 for "W. E. Installation", $46,248 for "W. E. Sales" and $53,282 for "Long Lines", a total of $156,146. Unde rthe "Contract Administration" column, he allocated $135,880 for "W. E. Installation", $110,978 for "W. E. Sales" and $127,877 for "Long Lines", a total of $374,705. The grand total of these items for the three columns mentioned is $624,539.

These three line items were referred to in the Beans' work sheets as independent unit expenses. H requested two of the National Directors of Western Electric Installation and AT&T Long Lines to estimate their time spent on the seven classifications. They gave their percentages for the first three of the seven categories (Columns 1, 2 and 3) and these percentages were then used to allocate the $624,539 in expenditures.

Here again, Mr. Ross was of the opinion that the procedures—like the ones used in regard to "Districts", *supra*—were not in accordance with generally accepted

principles of cost accounting and that the data base was inadequate. There were no contemporaneous time records maintained by the two Directors mentioned who were asked to record percentages of time spent some two or two and one-half years before, and no causal or beneficial relationship was established between the time when the two individuals were interviewed and the expenses of the three independent units.

For substantially the same reasons given for the holding of the Special Master that the "District" expenditures were impermissible, and based upon the opinion and conclusions of Mr. Ross, together with the relevant testimony and exhibits and the reasonable inferences to be drawn therefrom, the Special Master concludes that the Defendants have not met their burden of proof in regard to the expenditures listed in the first three columns under the headings "W. E. Installation", "W. E. Sales" and "Long Lines", amounting in the aggregate to $624,539 as permissible items and holds that they are impermissible.

The Record in this case does not indicate why CWA, after the decisions of the Supreme Court in 1963 in *Allen* and *Street*, both supra, did not establish a system for the keeping of contemporaneous time sheets by its upper echelon officers and employees, indicating the function for which such time was expended, so that the Union would have some credible basis for meeting its burden of proof (see *Allen*, supra) in regard to possibly impermissible items. The establishment of such a system would also appear to have been helpful to CWA in determining its costs for the functions in which it was engaged. Such a system has been established rather generally in the legal profession, whose members frequently charge their fees on the basis of their professional services supplied their clients, and there does not appear to be any substantial difficulty in establishing such a system for unions as well.

In any event, however, the uncontradicted evidence in this case is that no such system was established by CWA and its absence has in large part resulted in the necessary holding by the Special Master that the above items are impermissible in this case because of a failure by CWA to meet its burden of proof.

Negotiations

The item "Negotiations" relates to the negotiation of a collective bargaining agreement and is in the amount of $137,000 under Column 1, Collective Bargaining. This item is clearly permissible and the Special Master so holds.

Education

The item of Education allocated under the first three columns is as follows: "Collective Bargaining" $5,000; "Grievance" $2,000; and "Contract Administration" $22,000, a total of $29,000. Later in the Beans' Study is an additional "Education" item which is allocated under the first three columns as follows: "Collective Bargaining" $19,000; "Grievance" $7,000; and "Contract Administration" $83,000, a total of this second Education item of $109,000. The grand total of the two "Education" items is $138,000.

In regard to the "Education" items, the Beans' work sheets and supporting materials indicate that the costs of the CWA training were based upon four training programs and project codes within the training programs. A study was made of the number of training modules shipped to each District and the amount of training time required for each module. Each module's percentage relationship to the total was developed based upon the ratios of the number of modules multiplied by the amount of training time. The amounts were then allocated to the seven headings in the Beans' Study. The salary of the Education Director, his expenses and sup-

port were paid from Account #22. The expenses of the training programs themselves, to the extent they were absorbed by CWA, were charged to Account #48, "Education". The salary and expenses are properly identified in the Account Numbers mentioned and the total amounts have been allocated not only to the first three columns, "Collective Bargaining", "Grievance" and "Contract Administration", but also to the next four Columns, "Organizing", "Labor Legislation", "Community Services" and "Political", the last four Columns having already been held to be impermissible. In short, part of the "Education" expenditures are permissible and part are impermissible.

In the opinion of the Special Master, the Defendants have met the burden of proof that the portion of the "Education" expenditures allocated to the first three Columns are permissible and the total amount of those allocations, i.e., $138,000, is held to be a permissible expenditure.

Finance and Office Operations

In the Beans' letter of January 31, 1980, it is stated in regard to this item:

> "Finance and Office Operations—This includes the accounting and other offices involved in the financial management of the Union in that the dues processing and membership records functions require a disproportionate share of the total time and effort in this area, these activities were identified and classified as contract administration with the balance of the functioning being classified as administrative."

The Beans' work sheets and Mr. Beans' testimony (2/15/80, pages 70-71) indicate a list of salaries taken from payroll records of CWA during a conference with members of the acocunting department in regard to which persons were assigned to membership dues and data

processing areas. The data processing functions amounted to 31.88% of the total and the accounting and operations to 68.12%. The data processing figure based on the percentage mentioned amounted to $1,207,000 which was allocated to Column 3—"Contract Administration" —and the balance of $2,579,000 was allocated to Column 8—"Administrative".

In the opinion of the Special Master, the Defendants met their burden of proof in the allocation of $1,207,000 to Contract Administration and this amount is held to be permissible.

Development and Research

The next item for consideration is "Development and Research". In the Beans' Study, the amount of this item is $678,000, of which $252,000 is allocated to Column 1 —Collective Bargaining—and $416,000 to Column 8—Administration.

The Beans' work sheet on this subject indicates that this department is staffed primarily by economists and statisticians. They conduct studies and analysis to provide support for CWA's bargaining demands. They also conduct studies of the economic impact of various changing conditions. The allocations of the amount of this item, referred to above, appear to the Special Master to be reasonable and that CWA has met its burden of proof in regard to this item. The sum of $252,000 allocated to Column 1—Collective Bargaining—is consequently held to be permissible.

Legal

In the Beans Study, a substantial part of the expenditures of CWA for legal services are apportioned to: Column 1—Collective Bargaining—$55,000; Column 2—Grievance—$1,415,000; and to Column 3—Contract Administration—$31,000.

The Beans' letter of January 31, 1980, states in regard to this item:

> "Legal—Based on a review of the project codes assigned within the accounting system, and an analysis of certain of those codes, legal expenses were allocated to that activity, which appeared to give rise to the action."

The Beans' work sheets indicate a careful and complete allocation of the legal expenses by 18 project codes. Each check is identified, the name of the attorney given, and the nature of the service rendered is stated. This item is the best documented item of expenses thus far considered and the allocations among the first three Columns are, in the opinion of the Special Master, proper. CWA has met its burden of proof in regard to the items and the amounts allocated to the first three Columns, i.e., Column 1—Collective Bargaining—$55,000; Column 2—Grievance—$1,415,000; and Column 3—Contract Administration—$31,000, a total of the three allocations of $1,501,000, is held to be permissible.

Other Committees and Conferences

In the Beans' letter of January 31, 1980, it is stated in regard to this item:

> "Other Committees and Conferences—Individual Committees and Conferences were allocated to which it appeared that each was most closely related."

On the Beans' Study, the expenses for this item are allocated as follows: Column 1—Collective Bargaining—$67,000; Column 3—Contract Administration—$2,400; and to Column 8—Administration—$35,000. In CWA's books there are Project Codes into which the various items of expenditures are placed. In the Beans' work sheets, the totals of these Project Codes are then allocated to the eight Columns on the Beans' Study. The Special Master is of the opinion that the Defendants have not

met their burden of proof in regard to one of the items allocated to Column 1—Collective Bargaining—i.e., "W. E. Material Management Center Coordination Committee —$2,200."

The W. E. Installation and W. E. Sales items have already been held to be impermissible and the Defendants have not met their burden of proving that the W. E. Material Center Coordination Committee expense is directly connected with collective bargaining or necessary for its effectuation.

This item of $2,200 is held to be impermissible and should be subtracted from the $67,000 allocated to Column 1—Collective Bargaining, thereby reducing that amount to $64,800 which is held to be permissible. The amount of $2,400 allocated to Column 3—Contract Administration—is held to be permissible. This makes a total of $67,200, rounded off is $67,000.

CWA News and Newsletter

CWA News is a monthly, newspaper style publication sent to members of CWA (but not to the Agency Fee Payors). Its articles cover the entire field of CWA interests and activities. The expense of producing and mailing the publication, including the salary of the editor and his secretary, are paid out of Account # 035 "CWA News", so that the expense figures for this item are readily available. Salaries and personnel expenses are apportioned as 12% of the newspaper budget, the balance being production costs.

Mr. Beans in his letter of January 31, 1980, and in his testimony, indicated that the allocations of the expenses included in Account # 035 were based upon the space utilized by the various articles to one of the eight classifications. On this basis, which the Special Master finds to be reasonable, the following relevant allocations were, e.g.: 22.12% was allocated to Collective Bargaining,

2.11% to Grievances, .89% to Contract Administration and 31.8% to Administrative. Thus, in the Beans' Study, $82,600 was allocated to Column 1, "Collective Bargaining"; $7,900 to Column 2, "Grievances" and $3,300 to Column 3, "Contract Administration". The Special Master finds that CWA met its burden of proof in regard to these three items, a total of $93,800, rounded off to $94,000 is held to be permissible.

Pension Fund; Insurance, Hospitalization and Bonds; Taxes; Staff Moves; and Staff Illness Absence

Mr. Beans, in his testimony and on his work sheet 16-1, considered these items together under the heading "Fringe Benefit Distribution". This was logical inasmuch as the amounts of the items were allocated among the Seven Columns of the Beans' Study in the preparation of the salary distribution following the procedure already mentioned in regard to 'Districts'. The Pension Fund Budget Account Number is # 036, Insurance, # 037 and Taxes, # 038.

Using the percentages derived from the apportionment of salaries, Mr. Beans then allocated the following amounts under the first three columns and the eighth column as follows:

	Collective Bargaining	Grievance	Contract Administration	Administration
%	20.39	22.88	22.88	22.16
Pension Fund	578,000	636,000	635,000	616,000
Insurance, Hospitalization & Bonds	239,000	263,000	262,000	254,000
Taxes	127,000	140,000	140,000	136,000
Staff Illness Absence	11,000	12,000	12,000	12,000

For the reasons above set forth in regard to "Districts", pages 15-17, supra, the Special Master has concluded that

the Defendants have not met their burden of proof in regard to the expenditures under the headings, Pension Fund; Insurance, hospitalization and bonds; taxes; Staff moves; and Staff illness absence, all mentioned above and he is of the opinion that no part of such expenditures set forth in the Collective Bargaining, Grievance and Contract Columns of the Beans' Study is permissible and holds that these expenditures are impermissible.

Collective Bargaining Policy Committee

In the Beans' Study, "$10,000 has been allocated under Column 1—Collective Bargaining" for the expenditures for the Collective Bargaining Policy Committee. These expenditures are, in the opinion of the Special Master, clearly permissible as directly connected with Collective Bargaining and reasonably necessary to its effectuation. He holds that they are permissible.

Publicity and Public Relations

In the Beans' Study $202,000 is allocated to Column—"Collective Bargaining" and $915,000 to Column 8—"Administrative".

The bulk of these expenditures is for contract services including the purchase of air time to broadcast commercials in connection with upcoming national bargaining. The Special Master notes that Mr. Watts, President of CWA, indicated that the item named be classified as "Organizing". The Special Master is of the opinion that the Defendants have not met their burden of proving that any part of this item is directly connected with collective bargaining or is reasonably necessary for its effectuation, and from a consideration of the testimony, exhibits and reasonable inferences therefrom, considers that the $915,000 allotment to Column 1—"Collective Bargaining" is impermissible and so hold.

Foreign Affairs

In Mr. Beans Study, he places expenditures of $216,000 for "Foreign Affairs" under Column 1, "Collective Bargaining".

The Foreign Affairs Fund is used by CWA to pay the expense of CWA personnel participating in various international labor negotiations and functions. For example, one of these CWA and Deutsche Postgewerkschaft participate in joint trade union seminars in order to learn about each other's organization and country. Exhibit 849 indicates that: "All travel, food and lodging expense for the seminar participants and their spouses (are) paid by CWA out of the Foreign Affairs Account. Lost time for the Local Union participants will also be borne by CWA."

The theory of allocating these expenditures to Column 1 "Collective Bargaining" is because they allegedly are directly related to wages and working conditions in foreign countries which export products to the United States and thus affected job conditions and job opportunities of United States workers. In the opinion of the Special Master, however, there is insufficient proof of such an alleged effect and the Special Master concludes from the testimony, exhibits and reasonable inferences drawn therefrom that the Defendants have not met their burden of proving that these expenditures are directly connected with Collective Bargaining and are reasonably necessary for the effectuation thereof. These expenditures are therefore held to be impermissible.

Professional Fees

Professional fees of $141,000 have been allocated to Column 1, "Collective Bargaining" in the Beans' Study. This item contains expenditures from auditing, actuarial studies and other professional services other than legal services. It includes special actuarial studies and community services in support of collective bargaining.

The Special Master finds that the Professional Fees are directly connected with Collective Bargaining and are reasonably necessary for its effectuation and holds them to be permissible.

Contract Reports and Ratification

In the Beans' Study, expenditures of $6,300 are allocated under Column 1, "Collective Bargaining". Later in the Beans' Study there an item "Contract Report and Ratification" Fund in the amount of $441,600, a total of the two items of $447,900 rounded off to $448,000. These expenditures are directly connected with collective bargaining, are reasonably necessary for its effectuation and are held to be permissible.

Defense Fund

The expenditures for the Defense Fund amount to $1,324,000, all of which has been allocated to Column 1, "Collective Bargaining" in the Beans' Study.

The basic purpose of the Defense Fund is to establish benefits in the event of a strike. The use of the Fund and eligibility for strike benefits are contained in a pamphlet entitled "Defense Fund Rules". By the action of the CWA Executive Board all employees—agency fee payors and members alike—who honor a picket line are entitled to benefits from this Fund.

An examination, however, of Statement No. 5 entitled "Defense Fund" for the CWA year ended March 31, 1978, of the Annual Audit of Main, Latrentz & Co. (Defendants's Exhibit W-2), showing the expenditures for that year of $1,324,000 does not disclose that any of the expenditures were in connection with the C & P Telephone Company employees. One item listed was an expenditure of $500,000 for the United Mine Workers, obviously not an expenditure for the C & P Telephone Company employees. Other evidence has indicated that the expenditure of $429,000 for "National Collective Bargaining" does relate to the C & P Telephone Company employees.

The Plaintiffs earnestly contend that no part of the Defense Fund is permissible inasmuch as a strike only comes into being when there is a *failure* of collective bargaining, and should not be charged to "Collective Bargaining" for that reason. The Special Master does not accept this contention in that the right to strike and a strike itself is the ultimate sanction the Union may use in connection with its collective bargaining efforts and thus is directly connected with collective bargaining and may well be necessary for its effectuation.

The Special Master is of the opinion that items of expenditure from the Defense Fund in connection with or for the benefit of the C & P Telephone Company employees is a permissible expense and properly charged to the Agency Fee Payors. The Defendants have met this burden of proof in this regard for the expenditure of $429,000 under the heading "National Collective Bargaining" and this expenditure is held to be permissible. The balance of $895,000 of the Defense Fund allocated to Column 1—Collective Bargaining is held to be impermissible.

Administration

The Special Master is of the opinion that a proper proportion of permissible expenditures allocated in the Beans Study to Column 8—"Administrative" should be allocated to Column 1—"Collective Bargaining", Column 2 "Grievances" and Column 3—"Contract Administration", respectively. In the Beans Study the total of this total to Column 1—Collective Bargaining was $2,191,000, to Column 2—"Grievance" was $2,406,000 and to Column 3—"Contract Administration" was $2,372,000. There were also substantial allocations of the total of Column 8 "Administrative" to Column 4—"Organizing", Column 5 —"Labor Legislation," Column 6—"Community Services" and Column 7—"Political", but inasmuch as the expenditures in columns 4, 5, 6 and 7 have already been held to be impermissible, it is not necessary to consider further the allocation of parts of Column 8—"Administrative" total to Columns 4, 5, 6 and 7.

The various expenditures listed in Column 8—"Administrative" must now be considered, some of which are permisisble, some impermissible and some are partly permissible and partly impermissible. Only the permissible items of expenditure in Column 8—"Administrative" will be considered in the ultimate allocation to Columns 1, 2 and 3.

Turning then to a consideration of the item of expenditure allocated in the Bean's Study to Column 8—"Administrative", one finds as the first expenditure the amount of $652,000, designated "Administrative" under the heading: "Departments". This part of the total expenditure of the Administration Department of $721,000 of which $69,000 was allocated to Column 7—"Politics", two employees with their expenses and other miscellaneous expenses, amounting to $69,000.

It is clear, however, that the other officers and employees whose salaries and expenses are included in the amount of $652,000 performed services which the Special Master has held to be impermissible, such as organizing, labor legislation community services and the like. There were, however, no time sheets or contemporaneous memoranda indicating a breakdown of the time sheets and there was no proper analysis of the vouchers for various expenses to determine their proper allocation by function. The situation here is like the situation relating to the "District" expenditures and the Defendants have failed to meet their burden of proving which salaries and expenses or parts thereof are permissible. The Special Master holds that all of the expenditures of $652,000 allocated to Column 8—"Administrative" are impermissible.

Finance and Office Operations

This second item of expenditure of $2,579,000 is under the heading "Finance and Office Operations". As already indicated above, $1,207,000 under the same heading was allocated under Column 3—"Contract Administration",

which the Special Master held to be permissible. For the same reasons, the Special Master holds that the expenditure of $2,579,000 was properly allocated to Column 8 "Administrative" and will be considered to be a part of this column for future allocation.

Development and Research

This third item of expenditure of $416,000 is under the heading "Development and Research". As indicated above, $252,000 of the total amount of $678,000 was allocated under Column 1—"Collective Bargaining" which the Special Master held to be permissible. For the same reasons the Special Master holds this expenditure of $416,000 was properly allocated to Column 8—"Administrative" and will be considered to be a part of the Column for future allocation.

Legal

The fourth item of expenditure of $160,000 is under the heading "Legal". As already indicated above, a substantial part of the expenditure of CWA for legal services was allocated to the first three columns, i.e., Column 1—"Collective Bargaining" $55,000; Column 2—"Grievances" $1,415,000; and Column 3—"Contract Administration" $31,000. All of these three allocations were held to be permissible and for the reasons above stated, the Special Master holds this expenditure of $160,000 was properly allocated to Column 8—"Administrative" and will be considered to be a part of this Column for future allocation.

Convention and Related Committees

The fifth item of expenditure of $367,000 is under the heading "Convention and Related Committees". This is the total amount of expenditure for this item, no part of it having been allocated to any of the Columns 1-7.

The Convention is the highest governing authority of CWA, subject to the right of referendum to the Union's

membership. The convention meets each year between June 1 and August 31. It is composed of the elected officers of CWA plus local delegates in proportion to the membership of the local unions.

The Convention has sole authority to establish per capita dues for the National Union, to establish minimum dues to be charged by each local union, to fix the compensation of the elected CWA officers, to elect its president, its Executive Vice President and its Secretary-Treasurer every three years. It also decides appeals from internal union trial boards as well as appeals from action of CWA or its local union or of their officers or governing bodies alleged to be in violation of the CWA constitution, local by-laws or of the rights and privileges of union members.

It is clear that the expenditure for the related committees are directly connected with collective bargaining, grievances and contract administration and are reasonably necessary for their effectuation. The Special Master finds that the Defendants have met their burden of proof in regard to this item and the expenditure of $367,000 is held to have been properly allocated to Column 8—"Administrative" and will be considered to be a part of that column for future allocation.

Executive Board

The sixth item of expenditure of $158,000 is under the heading "Executive Board". The Executive Board is charged with governing the affairs of CWA between conventions and the same considerations already mentioned in regard to "Convention and Related Committees", supra, are applicable to the "Executive Board". The Special Master finds that the Defendants have met their burden of proof in regard to this item and the expenditure of $158,000 is held to have been properly allocated to Column 8—"Administrative" and will be considered to be a part of the Column for future allocation.

Other Committees and Conferences

As noted above under the same heading the seventh expenditure of $35,000 was allocated to Column 8—"Administrative". In the Beans' Study $67,000 was also allocated to Column 1—"Collective Bargaining" and $2,400 to Column 3—"Contract Administration". The Special Master found that the Defendants did not meet their burden of proof in regard to an item of $2,200 which was a part of the $67,000 allocated to Column 1—"Collective Bargaining". The $2,200 item was deducted from the $67,000 and the balance of $64,800 was held to be permissible. The Beans' work sheets 14-1 and 14-2 indicate the Defendants have met their burden of proof in regard to the $35,000 item and the expenditure of $35,000 is held to have been properly allocated to Column 8—"Administrative", and will be considered to be a part of that Column for future allocation.

CWA News and Newsletter

This eighth item of expenditure of $119,000 was allocated to Column 8—"Administrative". The Special Master has already considered the method of allocation of the CWA News and Newsletter expenditures and has held that the $82,600 allocated to Column 1—"Collective Bargaining", $7,900 to Column 2—"Grievance" and $3,300 to Column 3—"Contract Administration" were permissible and for the same reasons holds that the expenditure of $119,000 was properly allocated to Column 8—"Administrative" and will be considered to be a part of that Column for future allocation.

Pension Fund; Insurance, Hospitalization and Bonds; Taxes; Staff Moves; Staff Illness Absence

The items of expenditure under these various headings have already been listed above for Column 1—"Collective Bargaining", Column 2—"Grievance", Column 3—"Contract Administration" and Column 8—"Administrative". The amounts of expenditure allocated to Column 8—"Administrative" are as follows:

Pension Fund	$616,000
Insurance, Hospitalization and Bonds	254,000
Taxes	136,000
Staff Moves	24,000
Staff Illness Absence	12,000

For the reasons already given in holding that the allocations to Columns 1, 2 and 3 are impermissible, the Special Master holds that in regard to these items allocated under Column 8—"Administrative", the Defendants have not met their burden of proof and these items of $616,000, $254,000, $136,000, $24,000 and $12,000, respectively, will not be included in Column 8—"Administrative" for future allocation.

Contingency

The amount of the item for "Contingency" is $90,000 all of which is placed by the Beans' Study in Column 8 —"Administrative".

This item is to cover unforeseen expenditures during the fiscal year. The amount is the same as was used in the preceding fiscal year 1976-77. It appears to be reasonable and the Special Master finds that the Defendants have met their burden of proof in regard to this item and holds that the amount of $90,000 was properly allocated to Column 8—"Administrative" and will be considered to be a part of that Column for future allocation.

Equipment Additions

This item of $189,000 was allocated under the heading "Equipment Additions" to Column 8—"Administrative".

The entire amount of this item, $189,000, appears in CWA Account No. 41 and covers new and replacement office equipment and furnishings for the National Office. The Special Master finds that the Defendants have met their burden of proof in regard to this item to $189,000 and holds that it was properly allocated to Column 8—

"Administrative" and will be considered to be a part of that Column for future allocation.

Building Operations

The expenditures for this item of $915,000 were entirely allocated to Column 8—"Administrative" and appear in CWA Account No. 44.

This item covers the maintenance, repair and operating costs of the building owned by CWA as well as minor repairs to leased offices. The Special Master finds that the Defendants have met their burden of proof in regard to this item of $915,000 and holds that it was properly allocated to Column 8—"Administrative" and will be considered to be a part of that column for future allocation.

Professional Fees

This item consists of $24,000 allocated to Column 8—"Administrative". The Special Master has already considered an allocation of expenditure for Professional Fees of $141,000 under Column 1—"Collective Bargaining" and held that item to be permissible. For the same reasons given above in regard to item $141,000, the Special Master finds that the Defendants have met their burden of proof in regard to this item of $24,000 and holds that it was properly allocated to Column 8—"Administrative" and will be considered to be a part of that column for future allocation.

Affiliation Dues

This entire item of $1,090,000 is allocated under the heading "Affiliation Dues" to Column 8—"Administrative".

CWA pays affiliation dues to the AFL-CIO based upon its membership count (which does not include the Agency Fee Payors). This item amounts to $1,090,000. In addition, CWA pays dues to the Postal Telephone and Tele-

graph International (PTTI). Prior to the budget year 1977-80, the PTTI dues were paid from the Foreign Affairs Account. The Special Master has already held that the expenditures from the Foreign Affairs Account are impermissible for the reasons given above.

In regard to the $1,090,000 item, there is no testimony that the activities of the AFL-CIO, or of PTTI for that matter, participate in collective bargaining, grievance adjustment or contract administration of the contract with the C & P Telephone Company, or, indeed, with any Bell System operating company.

The documentary exhibits indicate that AFL-CIO engages in a wide field of activities not directly connected with collective bargaining, grievance adjustment or administration of the contract between CWA and the C & P Telephone Company. These activities include, e.g., urban policy, copyright revision and performance rights, truth in fund raising, foreign assistance, hospital cost containment, limited tax credit, a national health program, support for the NAACP membership dues, the soviet workers movement and the death of C. L. Dennis.

In the opinion of the Special Master, after considering the testimony and exhibits and the reasonable inferences to be drawn therefrom, the Defendants have not met their burden of proving that the expenditure of $1,090,000 or the activities mentioned are directly connected with collective bargaining, grievance adjustment or contract administration and reasonably necessary for their effectuation. That expenditure was improperly allocated to Column 8—"Administrative" and the Special Master holds that it will not be included in that column for future allocation.

Recapitulation

It will now be helpful to recapitulate the amounts of the permissible expenditures above set forth. Attached to this Report is *Appendix C*, being a *List of Aggregate*

Expenditures in the Beans' Study in Column 1—Collective Bargaining, Column 2—Grievance and Column 3—Contract Administration Which the Special Master Has Held to be Permissible. The total is $4,424,000. This total, however, does not include the allocation of that part of the portion of Column 8—"Administrative" which is properly allocated to the total of Column 1—Collective Bargaining, Column 2—Grievance and Column 3—Contract Administration.

As a preliminary to making the proper allocations of portions of Column 8—"Administrative", attached to this Report is *Appendix D* which is a *"List of Expenditures in Column 8—Administrative in the Beans' Study Which the Special Master Has Held to be Permissible"*. The total is $5,052,000.

Calculations of Percentages

Mr. Beans allocated the total expenditures in Column 8—"Administrative" among the first seven columns on the basis of the proportion of dollar totals of the first seven columns to the total amount of expenditures (less the total of Column 8—Administrative), during the fiscal year ending March 31, 1978.

For example, the total expenditure for that fiscal year was $29,240,077.58. From this amount was deducted $8,064,516.54, the total amount of Column 8—"Administrative" leaving a balance of expenditures excluding the total of Column 8, of $21,175,561.04. This figure he divided into the respective totals of the first seven columns to reach the percentage of the total of Column 8—"Administrative" to be allocated to each of the first seven columns. In Column 1—"Collective Bargaining" of the Beans' Study the total of that column was $5,754,418.25 so that dividing the $21,175,561.04 net total into $5,754.418.25, the percentage figure of 27.1% was reached.

The Special Master will use this Beans' method of allocation of the permissible expenditures in Column 8—

"Administrative", which amount to $5,052,000 as above set forth and as appear in Schedule D.

For convenience, the Special Master has consolidated in his analysis, supra, the permissible amounts in the first three columns, i.e., Column 1—Collective Bargaining, Column 2—Grievance, and Column 3—Contract Administration. The total of these first three columns is $4,424,000 as above set forth and as appears in Appendix C. Dividing the $21,175,561.04 figure into the $4,424,000, a percentage of approximately 24% is reached, so that 24% of the total of permissible administrative expenses, i.e. $5,052,000 or $1,212,000, is to be added to the $4,424,000 subtotal giving a figure of $5,636,000 for the grand total of permissible expenses. Dividing $29,240,000, the total of expenditures for the fiscal year ending March 31, 1973, into $5,636,000 a percentage figure of 19.24% is reached, rounded off to 19% of permissible expenditures which CWA may charge the Agency Fee Payors.

This means, of course, that CWA has improperly charged the Agency Fee Payors 81% of the dues paid by them to CWA.

The Special Master will also follow Mr. Beans' position that the fiscal year April 1, 1977, to March 31, 1378, is a reasonably typical year and will apply the percentage figures above set forth to all of the relevant times involved, beginning January 1, 1976, to and including the date of filing this Report in the District Court.

Allocation of Costs

Each side paid for the original copy of the transcript of the testimony for use by the Court and the Special Master, as well as for copies of the testimony for use by counsel for the parties. The amount paid to Levine & Associates, who took and transcribed the testimony by each side was $6,890.51. The total fees of the Special

Master in accordance with the agreement in regard to this through June 30, 1980, amounted to $29,330.69, the Plaintiffs paying one-half and CWA paying the remaining one-half. Additional fees will be payable to the Special Master for July and August, 1980, and will be added to the $29,830.69 already mentioned. The cost of the expert witnesses for the Plaintiffs, Irving B. Ross, amounted to $1,068.00 and the cost of the expert witnesses for CWA—Dr. Galenson, Dr. Littell, Dr. Wirtz and Mr. Beans—amounted to $4,709.07. In addition, CWA claims that it is entitled to the expenses of its witnesses and in lieu of itemizing, claims $30.00 a day for 27 days, or $810.00, which the Special Master finds to be reasonable and taxable as costs. The Special Master will recommend to this Court that all of the above mentioned items be taxed as costs in the case, and that these costs as well as all costs in the case be paid 81% by the Defendants and 19% by the Plaintiffs.

Counsel Fees

In the Complaint, the Plaintiffs claim reasonable counsel fees and punitive damages. Counsel for the Defendants have advised the Special Master that they will claim an allowage of reasonable counsel fees. Counsel for the respective parties, however, have indicated that their claims will be presented to the Court at a later stage of the proceedings in the case and that the submission of the case to the Special Master is without prejudice to, or waiver of, such claims. The Special Master approves of this procedure and considers the filing of this Report to be without prejudice to, or waiver of, those claims.

Findings of Fact

The Special Master makes the following findings of fact:

1. The items of expenditure by CWA during the fiscal year beginning April 1, 1977, and ending March 31, 1978

(Fiscal 1977-78), are characteristic of the expenditures of CWA for all periods from and after January 1, 1976.

2. The total expenditures by CWA during Fiscal 1977-78 are $29,240,000.

3. The expenditures by CWA for Fiscal 1977-78 for Administrative purposes amounted to $8,065,000.

4. Of the amount of expenditures by CWA for Fiscal 1977-78 for Administrative purposes of $8,065,000, 24%, or $1,212,000, were permissible expenditures as calculated on Schedule E, hereto attached, and should be allocated to the total of permissible items of expenditure for Collective Bargaining, Grievance Adjustment and Contract Administration.

5. The total expenditures for the 10 categories set forth in Appendix C, hereto attached, of $4,424,000, together with the amount of $1,212,000 mentioned in Finding of Fact No. 4, supra, a total of $5,636,000, are directly connected with, and are reasonably necessary for the effectuation of collective bargaining, grievance adjustment and contract administration and are permissible items of expenditure.

6. The percentage of total permissible expenditures of the total expenditures of CWA during Fiscal 1977-78 is 19%, as calculated on Schedule E, hereto attached.

7. The percentage of total impermissible expenditures of CWA during Fiscal 1977-78 is 81%, as calculated on Schedule E, hereto attached.

Conclusions of Law

The Special Master, in addition to the Conclusions of Law heretofore made by the Court, submits the following Conclusions of Law:

1. It is proper for the Special Master to use as a rule or guide in determining whether or not items of expenditure by CWA are permissible and properly

chargeable against the amounts paid by the Plaintiffs as Agency Fee Payors to CWA that such item of expenditure is directly connected with and is necessary for the effectuation of collective bargaining, grievance and adjustment and contract administration.

2. "Collective Bargaining, Grievance Adjustment and Contract Administration" are properly defined as set forth in Pages 10 and 11 of this Report.

3. It is proper for the Special Master to use the expenditure of CWA for Fiscal 1977-78 as characteristic of the other periods of time involved in this action and to use such expenditures for the calculation of the percentage of permissible expenditures which may properly be charged to the Plaintiffs, as Agency Fee Payors of CWA, and the percentage of impermissible expenditures which may not be so charged.

4. CWA must refund to the Plaintiffs listed in Schedule F, hereto attached, 81% of the amounts heretofore paid by them to CWA as Agency Fee Payors including the amounts listed in Schedule F and such additional amounts up to the date of filing this Report as the Plaintiffs may establish and a monetary judgment for those amounts should be entered by the Court.

5. The Plaintiffs listed in Schedule F are entitled to a permanent injunction restraining CWA, its officers, agents and employees from charging or collecting and from attempting to charge and collect from the Plaintiffs in excess of 19% of the amount of dues, assessments or other payments payable by the members of CWA, subject, however, to modification by the Court upon a proper motion by CWA for such modification and the establishment by CWA at the time of hearing on such a motion that amounts in excess of such 19% were properly chargeable in the future to the Plaintiffs as Agency Fee Payors.

6. The items of expenditure mentioned under the heading "Allocation of Costs" on page 39 of this Report

are properly taxable as costs in this case and those costs, as well as any other costs in the case will be paid 81% by the Defendants and 19% by the Plaintiffs.

7. Claims for counsel fees or punitive damages are not passed upon by the Special Master and the filing of the Report is without prejudice to, or waiver of, any such claims.

Recommendations by the Special Master to the Court

The Special Master recommends to the Court that:

1. The Report of the Special Master be adopted and the aforegoing Findings of Fact and Conclusions of Law be adopted, applied and confirmed by the Court.

2. In view of the length of the Report of the Special Master and the substantial number of issues, exhibits and figures involved, the time within which the parties may file exceptions, if any, to the Report be enlarged from the 10 day period provided for in Federal Rule 33 (e) (2), to 30 days from the date of filing the Report in the Court. A form of suggested order is submitted herewith for the recommended extension of time.

Respectfully Submitted

Dated: August 18, 1980

/s/ Wilson K. Barnes
WILSON K. BARNES
Special Master

January 31, 1980

Mr. Louis B. Knecht, Secretary-Treasurer
Communications Workers of America
1925 K Street, N.W.
Washington, D.C. 20036

Dear Mr. Knecht:

In connection with your request, we have reviewed the activities of and expenses associated with the departments and programs of the Union for the purpose of determining the portion of member dues spent in connection with the various activities of the Union for the period April 1, 1977 to March 31, 1978.

The significant activities have been categorized as follows:

(1) Collective bargaining—includes research, preparation for and actual negotiation of the collective bargaining agreements; strike and picketing activity and other activities directly related to the improvement of terms and conditions of employment.

(2) Grievances—including handling and processing of grievances up to arbitration, trial and processing of arbitration cases and, prosecution of court actions arising from such cases.

(3) Contract administration—includes the administration of the collective bargaining agreement in effect at any given time, conducting meetings necessary for the Union to properly carry out its duties as the exclusive collective bargaining representative, carrying on activities which promote informed contact between bargaining unit employees and their representatives, training of staff people to assure competent representation, publishing information considered to be

necessary to the carrying out of CWA's duties as collective bargaining representative, defense of court actions to protect members of the bargaining unit from being wrongfully deprived of rights guaranteed by statute and by the collective bargaining agreement, collecting, crediting, managing and expending member dues and agency fee payer's dues equivalents and, preparing reports for regulatory agencies.

(4) Organizing—expenses incurred in connection with organizing employees not represented by a labor organization into bargaining units.

(5) Labor legislation—support of or opposition to legislative measures and administrative regulations which affect the subject of collective bargaining.

(6) Community services—participation in charitable and social activities which benefit the community and the well being of people in general.

(7) Political—includes "get-out-the-vote" campaigns, non-partisan election and political education, encouraging bargaining unit members to support candidates and policies positively affecting their wages, hours and conditions of work, and administrative support of the voluntary C.O.P.E. Fund.

(8) Administrative—those activities which benefit the organization as a whole, are necessary for the orderly operation of the union, and encompass a range of responsibilities which is so broad as to make specific allocation unfeasible.

Those programs and departments whose activities are, in general, concerned with one of the designated categories have been assigned to such category. However, in those instances in which the program or department

responsibilities were not so narrowly defined, it was necessary to allocate the costs to the various activities encompassed. Generally, the areas requiring allocation and the basis for allocation was as follows:

Districts—The staff of District 2 were asked to indicate which of the activities listed as activities of the Union in the, "Answer of CWA Defendants to Plaintiffs' First Amended Interrogatories", Interrogatory No. 1, were included in their job responsibilities and to what extent each of the activities occupied their time. Those responses in percentages of time were translated into salary dollars which were then used as the basis for allocation of district costs.

W.E. Installation, W.E. Sales, Long Lines—Expenses of these activities were allocated on the basis of discussions with two of the three National Directors as to their areas of responsibility and their estimate of time spent in each of the areas. Due to the close correlation of the time estimates from the two directors interviewed, we did not extend our review to a meeting with the third director.

Education—Since the educational programs are constructed on a series of modules, each available module was categorized into one of the enumerated activities. We then tabulated the various modules shipped during the period under study and developed the usage of the various modules which was then translated into training time. Educational expenses were then allocated on the basis of training time.

Administrative—The staff assigned to this area have broad responsibilities for the overall administration of the Union, however, two persons were indicated as having primary responsibilities for COPE and other political activities. The salaries for those persons, and a proportionate share of other office costs were classified as political.

Finance and office operations—This includes the accounting and other offices involved in the financial management of the Union. In that the dues processing and membership records functions require a disproportionate share of the total time and effort in this area, these activities were identified and classified as contract administration with the balance of this function being classified as administrative.

Legal—Based on a review of the project codes assigned within the accounting system, and an analysis of certain of those codes, legal expenses were allocated to that activity which appeared to give rise to the action.

Other committees and conferences—Individual committees and conferences were allocated to that activity to which it appeared that each was most closely related.

CWA News and Newsletter—This allocation was based on a review of the respective publications and an assignment, based on the space utilized, of the various articles to one of the activities.

Pension Fund—Contributions to the pension fund have been allocated in proportion to the salaries charged to each activity.

Insurance, hospitalization and bonds—The cost of employee benefit insurance (hospitalization, dental, etc.) were allocated on the basis of salaries. Bonding, casualty and other general business insurance expense was included in the administrative category.

Taxes—Payroll taxes were allocated on the basis of salaries, while personal property, sales and other general business taxes were included in administrative costs. Real estate taxes are included in the building operating costs.

Staff moves, Staff-illness absence—These items have been allocated on the basis of the salary distribution.

Administrative—The costs accumulated in the administrative category were allocated to the other activities in proportion to the costs accumulated within such categories.

As shown on the following schedule, Classification of Expenditures, these procedures produced the following results:

Activity	% of Dues
Collective bargaining	27.17
Grievances	29.83
Contract administration	29.41
Organizing	6.20
Labor legislation	2.27
Community services	3.35
Political	1.77

We have also included a reconciliation of expense categories used in this study with the total expenses shown in the annual audit report.

If you have any questions or comments, please do not hesitate to contact us.

Very truly yours,

CERTIFIED PUBLIC ACCOUNTANTS

BEST AVAILABLE COPY

COMMUNICATIONS WORKERS OF AMERICA

CLASSIFICATION OF EXPENDITURES

YEAR ENDED MARCH 31, 1978

	Collective Bargaining	Grievances	Contract Administration	Organizing	Labor Legislation	Community Services	Political	Administrative
General Fund								
Districts	$1,724,178.73	$3,651,778.79	$3,429,286.22	$ 679,191.28	$212,002.56	$322,367.89	$177,547.05	$
W.E. Installation	33,970.03	56,616.71	135,880.10					
W.E. Sales	27,744.61	46,241.02	110,978.45					
Long Lines	31,969.27	53,282.11	127,877.06					
Departments								
Negotiation	136,918.09							
Education	5,154.14	1,906.18	22,171.34	4,344.81	2,981.74	9,344.55	7,342.52	
Legislation					81,056.45			
Administrative							69,483.01	652,096.72
Finance and office operations			1,207,225.89					2,579,470.24
Community Services						33,763.11		
Development and Research	252,093.05							
Other headquarters								416,737.44
Beirne Memorial Foundation						100,000.00		
Contributions						2,770.00		
Legal	55,015.58	1,414,805.33	30,706.34	44,318.30				159,784.75
Convention and related committees								366,908.89
Executive Board								158,304.61
Other committees and conferences	66,722.51		2,396.91				2,531.86	34,688.06
CWA News and Newsletter	82,642.16	7,883.14	3,325.11	24,471.35	78,457.75	46,215.35	11,806.02	118,807.45
Pension Fund	577,952.64	636,053.70	634,663.73	149,561.58	56,155.09	63,104.98	46,425.25	616,038.03
Insurance, hospitalization and bonds	238,565.41	262,548.18	261,974.43	61,735.54	23,179.52	26,048.27	19,163.26	454,241.35
Taxes	127,375.99	140,180.98	139,874.64	32,962.14	12,376.12	13,907.82	10,231.74	187,978.12
Contingency								90,362.24
Equipment additions								188,857.22
Collective Bargaining Policy Committee	9,896.93							
Building operations								914,548.02
Publicity and public relations	201,597.11							
Foreign affairs	215,503.74							
Education	19,414.78	7,187.83	83,496.35	16,355.81	11,238.46	35,196.82	27,650.29	
Professional fees	141,302.62							
Staff moves	22,955.82	25,263.55	25,208.34	5,940.47	2,230.44	2,506.48	1,843.97	24,468.54
Contract reports and ratification	6,373.26							
Staff - illness absence	10,920.49	12,018.31	11,992.05	2,825.98	1,061.06	1,192.38	877.21	11,640.12
Affiliate member expense - LPN				14,986.28				
Affiliation dues								1,089,584.74
Defense Fund	1,324,481.63							
Organizing Fund				195,777.97				
Citizenship Fund						53,156.96		
District Organizing Allocation Fund				80,636.51				
Contract Report and Ratification Fund	441,658.66							
	5,754,414.25	6,315,765.83	6,227,056.96	1,313,108.02	480,739.19	709,574.61	374,902.18	8,064,516.54
Administrative	2,191,129.14	2,405,645.28	2,371,774.32	500,000.03	183,064.53	270,161.30	142,741.94	(8,064,516.54)
$29,240,077.58	$7,945,543.39	$8,721,411.11	$8,598,831.28	$1,813,108.05	$663,803.72	$979,735.91	$517,644.12	
	27.17%	29.83%	29.41%	6.20%	2.27%	3.35%	1.77%	

APPENDIX B

A portion of the Answers of the CWA Defendants to the Plaintiffs' First Amended Interrogatories dealing with Categories of Activities of CWA:

1. Handling and processing of grievances up to arbitration for members of the bargaining unit.

2. Participation in investigation, authorization and trial and processing of arbitration cases for members of the bargaining unit.

3. Administration of the collective bargaining agreement in effect at any given time.

4. Preparation for, research for and actual negotiation of the collective bargaining agreement covering the terms and conditions of employment of members of the bargaining unit for a given period of time.

5. Organizing employees in bargaining units not yet represented by a labor organization to strengthen CWA and thereby enable it to represent the members of the bargaining unit more fully and ably.

6. Conducting union meetings and conventions to assure that CWA adequately and properly carries out its duties as the exclusive collective bargaining representative.

7. Support of and opposition to legislative measures and administrative regulations which affect the subjects of collective bargaining; e.g., hours, wages and other terms and conditions of employment.

8. Strike and picketing activity, including support, advice, research and strategy utilized to improve terms and conditions of employment and to protect employees against employer unfair labor practices.

9. Recreational and social activities such as Christmas parties and annual picnics open to union members and

agency fee payers alike which afford an opportunity to bargaining unit employees to meet informally with their elected and appointed representatives to exchange information of mutual benefit, make known their complaints and suggestions for improvement of the contract on its administration, and break down or avoid internal disagreements which might impede the union's bargaining power or weaken its position with the employer.

10. Retirement, health and hospitalization and other fringe benefits provided for CWA staff members who participate in, contribute to or support contract bargaining or administration.

11. Training of CWA staff people to assure up-to-date highly competent representation of the bargaining unit members, including the training of stewards and area representatives to participate in contract administration and grievance adjustment.

12. Publications necessary to the carrying out of CWA's duties as collective bargaining representative.

13. Political activities such as "get-out-the-vote" campaigns; nonpartisan election and political education and encouraging bargaining unit members to support candidates and policies positively affecting their wages, hours and conditions of work.

14. Prosecution of court actions beneficial to the bargaining unit and to enforce contractual and statutory rights guaranteed to all members of the bargaining unit.

15. Defense of court actions beneficial to the bargaining unit and to protect members of the bargaining unit from being wrongfully deprived of rights guaranteed to them by statute and by the collective bargaining agreement.

16. Activities directly related to the improvement of terms and conditions of employment of union members and agency fee payers alike, including seeking legal, eco-

nomic, technical and medical advice on a wide range of work oriented subjects.

17. Collecting, crediting, managing and expending members dues and agency fee payers' dues equivalents as provided in the collective bargaining agreement, the constitution of the union and the laws of the United States, and preparing and furnishing reports and responses to agencies legally empowered to oversee union activities and expenditures.

18. Monitoring, overseeing and advising District and Local officers and staff to ensure effective and correct administration of the contract, compliance with all applicable laws, rules and regulations, and receive complaints and suggestions for improvement of the contract and its administration.

19. Participation in community affairs on all levels to enhance the Union's reputation, recognition and acceptance while impacting upon the conditions of life for members and non-members alike, and affecting the Union's bargaining power through public empathy and understanding.

20. Administrative support of its voluntary C.O.P.E. Fund as permitted by applicable Federal and State election laws.

21. Per capita contributions to the AFL-CIO calculated and transmitted solely for union membership, but with the purpose of improving wages, hours and conditions of employment for all workers in bargaining units represented by AFL-CIO member unions.

APPENDIX C

List of Aggregate Expenditures in the Beans' Study in Column 1—Collective Bargaining, Column 2—Grievances, and Column 3—Contract Administration Which the Special Master Has Held to be Permissable

Category in the Beans' Study	Amount
Negotiation	$ 137,000
Education	138,000
Finance and Office Operations	1,207,000
Development and Research	252,000
Legal	1,501,000
Other Committees and Conferences	67,000
CWA News and Newsletter	94,000
Collective Bargaining Policy Committee	10,000
Professional Fees	141,000
Contract Reports and Ratification	448,000
Defense Fund	429,000
Total	$4,424,000

APPENDIX D

List of Expenses in Column 8—Administrative, of the Beans' Study Which the Special Master Has Held to be Permissable

Category in the Beans' Study	Amount
Furniture and Office Operations	$2,579,000
Development and Research	416,000
Legal	160,000
Convention and Related Committees	367,000
Executive Board	158,000
Other Committees and Conferences	35,000
CWA News and Newsletter	119,000
Contingency	90,000
Equipment Additions	189,000
Building Operations	915,000
Professional Fees	24,000
Total	$5,052,000

APPENDIX E

Summary of Calculations of Percentages

I

Percentage of Allocation of Total of Permissable Items in Column 3—Administration, of Total of Permissable Items in the Aggregate of Permissable Items in Column 1—Collective Bargaining, Column 2—Grievances and Column 3—Contract Administration

Total expenditures for fiscal year	$29,240,000
Less total expenditures in Column 8	8,065,000
Net expenditures less Column 8	$21,175,000
Total of permissable expenditures in Column 1—Collective Bargaining, Column 2—Grievances, and Column 3—Contract Administration	$4,424,000
Divided by $21,175,000.00	24%

II

Calculation of Total Permissable Expenditures for Column 1—Collective Bargaining, Column 2—Grievances, and Column 3—Contract Administration

Total of permissable expenditures in Column 8—Administrative	$ 5,052,000
24% of $5,052,000	1,212,000
Add, $4,424,000, supra	4,424,000
Total of permissable expenditures from Columns 1, 2 and 3	$ 5,636,000

III

Calculation of Percentage of Permissable and Impermissable Expenditures

Total expenditures during the fiscal year	$29,240,000
Divided into $5,636,000, total permissable expenditures	19.24%
Rounded off to—percentage of permissable expenditures	19%
Percentage of impermissable expenditures	81%

APPENDIX F

LIST OF PLAINTIFFS WHO ARE ENTITLED TO REIMBURSEMENT BY CWA

Name of Plaintiff		Amount of Agency Dues Paid to 9-30-79 Unless Otherwise Noted
	Local 2100	
Doris Ambrose		$ 431.50
Jacquiline B. Randon		431.50
	Local 2101	
Rue Downey	(to 9-30-78)	234.00
Kathleen Hal	(to 9-1-77)	160.00
Clay Lutz	(to 9-30-78)	234.00
Roland Merkle	(to 9-30-78)	284.00
Doris Morrow	(to 9-30-77)	132.00
Frances Phillips		410.22
Lois Stallings		410.22
Harry Swartz, Jr.		415.52
	Local 2108	
John Hurley		562.54
Harriet Lipscholtz		558.90
Barbara McGoughey	(to 11-16-76)	110.00
Marion Northrop		558.90
	Local 2110	
Mary Anna Cox		359.03
Et' el Merryman		390.50
Vi an Reedy		358.00
Barbara Russell		404.03
	Total	$6,444.86

(5)

No. 86-637

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

COMMUNICATIONS WORKERS OF AMERICA AND ITS LOCALS 2100, 2101, 2108, AND 2110, PETITIONERS

v.

HARRY E. BECK, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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3818

QUESTION PRESENTED

Whether an employee of an employer subject to the National Labor Relations Act states a good federal cause of action, either for breach of the duty of fair representation or for violation of the First Amendment, by a claim that, over the employee's objection, his exclusive bargaining representative expends money collected from him under a union security provision for purposes unrelated to collective bargaining, contract administration, or grievance adjustment.

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Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519:

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28 U.S.C. 1331 2
28 U.S.C. 1337 ..... 2, 6
29 U.S.C. 185(a) 2
42 U.S.C. 1983 2

Miscellaneous:

Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. Pa. L. Rev. 933 (1952) 30
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2 C. Morris, *The Developing Labor Law* (2d ed. 1983) 20
NLRB, *Legislative History of the Labor Management Relations Act, 1947* (GPO 1948):
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Vol. 2 ..... 15, 16, 17, 18
S. 1126, 80th Cong., 1st Sess. (1947) 14
S. Rep. 105, 80th Cong., 1st Sess. (1947) 14, 15
Wellington, *The Constitution, The Labor Union, and "Government Actional"*, 70 Yale L.J. 345 (1961) 27, 29

In the Supreme Court of the United States

OCTOBER TERM, 1986

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COMMUNICATIONS WORKERS OF AMERICA AND ITS LOCALS 2100, 2101, 2108, AND 2110, PETITIONERS

v.

HARRY E. BECK, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioners, the Communications Workers of America and certain of its locals, are the exclusive bargaining representative of the employees of American Telephone and Telegraph Company (AT&T) and various of its subsidiaries (Pet. 2). Petitioners' collective bargaining agreements with AT&T contain a "union security" provision (*id.* at 3). This provision requires all employees represented by petitioners, including employees who are not union members, to pay to petitioners, as a condition of their continued employment, an "agency fee" in an "amount equal to the periodic dues" paid by union members (*ibid.*). Petitioners use the agency fees so collected to cover the costs that they incur in collective bargaining, contract administration, grievance adjustment, and, of

particular importance here, various other activities, including efforts to organize the employees of other employers, lobbying for labor legislation, and participating in social, charitable, and political events (Pet. App. 75a-80a).

2. In June 1976, respondents, twenty non-union-member employees,[1] commenced this suit in federal district court against petitioners,[2] alleging that the expenditure of their agency fees for purposes unrelated to collective bargaining, contract administration, or grievance adjustment ("non-collective bargaining purposes") violated petitioners' duty of fair represention, the First Amendment, and certain common law fiduciary duties (Pet. 2-3).[3] Respondents prayed that the court declare unlawful the exaction of agency fees for non-collective bargaining purposes, enjoin petitioners from exacting agency fees for such purposes, and award respondents monetary relief for fees previously so collected and used (C.A. Supp. App. 25-27).

In March 1979, the court granted partial summary judgment to respondents (Pet. App. 135a-142a). It declared that "collect[ing] * * * amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment * * * violates the First Amendment rights of the [respondents]" (*id.* at 141a). The court enjoined petitioners from collecting in the future "amounts authorized by the agency shop clause in excess of the amount necessary for the three enumerated purposes" (*id.* at 140(a)), and ordered petitioners "to refund

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[1] A number of other employees have since joined as plaintiffs (Pet. App. 31a n.1).

[2] Respondents also named their employers and the AFL-CIO as defendants (Pet. App. 31a n.3). On motion, however, these additional defendants were dismissed from the case (*ibid.*).

[3] Jurisdiction over the duty of fair representation claim was predicated on 28 U.S.C. 1337 and 29 U.S.C. 185(a); jurisdiction over the First Amendment claim was predicated on 28 U.S.C. 1331 and 42 U.S.C. 1983; and jurisdiction over the common law fiduciary duty claim was predicated on the court's pendent jurisdiction. Pet. App. 32a; C.A. Supp. App. 4-5.

to each [respondent] for every year since January 1, 1976 an amount reflecting that portion of his dues-equivalent agency fees which was spent for [non-collective bargaining] purposes" (*id.* at 142a). The court referred the case to a special master so that appropriate refunds could be calculated (*id.* at 141a).

The special master conducted lengthy proceedings and submitted findings to the court, which adopted them on March 4, 1983, with only slight modification (Pet. App. 112a-126a). The court affirmed the master's conclusion that petitioners failed to prove by "clear and convincing evidence" that more than 21% of their funds had been expended on matters germane to collective bargaining (*id.* at 119a-121a, 123a). And it ordered petitioners to refund 79% of the agency fees that respondents had paid during the period January 1, 1976, to March 31, 1983, and to implement a recordkeeping system that would more accurately separate future collective bargaining and non-collective bargaining expenditures (*id.* at 125a, 108a-109a).

3. A divided panel of the Fourth Circuit affirmed in part, reversed in part, and remanded for further proceedings (Pet. App. 29a-83a). Noting that "[t]he complaint herein states in separate counts not merely a cause of action charging a violation of the First Amendment in the compelled payment of the dues-equivalent under threat of loss of job, but also a cause of action under section 8(a)(3) of the [National Labor Relations Act (NLRA)] * * * and related thereto, a violation by [petitioners] of their duty of fair representation" (*id.* at 45a), a majority of the panel determined that respondents should prevail on both "statutory and constitutional" grounds (*id.* at 72a). The panel majority determined, however, that use of a "clear and convincing evidence" standard in determining the proportion of petitioners' expenditures attributable to non-collective bargaining activities had been improper and that a remand was necessary so that disputed factual issues could be resolved under the appropriate evidentiary standard (*id.* at 74a-81a).

a. With respect to respondents' substantive claims, the majority began by noting that "[s]ection 8(a)(3) * * * provides permissive authority for an agreement between an employer and the exclusive bargaining representative * * * whereby employees are required to have union 'membership' as a condition of employment, subject however, to the express condition that no employer [may] discharge an employee 'for nonmembership * * * if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership'" (Pet. App. 46a-47a, quoting 29 U.S.C. 158(a)(3)). The majority found that "[t]he legislative purpose of section 8(a)(3), as evidenced in the legislative record, was twofold: First, Congress intended the elimination of the closed shop and the substitution of the union or agency shop; second, in response to the plea of the unions that the existing statute encouraged 'free riders,' employees who enjoyed the benefits of collective bargaining but shared none of the costs of the bargaining process, it included the 'membership' provision or requirement" (Pet. App. 47a), a requirement that, the majority observed, Congress had "'whittled down to its financial core'" (*ibid.*, quoting *NLRB* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963)). The majority concluded that "the extent of the objecting employee's obligation under the union or agency contract is the payment of dues, and * * * the obligation to pay dues [is], it would seem, directly related to the costs of the collective bargaining itself" (Pet. App. 48a).

The panel majority found its conclusion supported by this Court's interpretation of Section 2, Eleventh of the Railway Labor Act (RLA), 45 U.S.C. 152, a statute it characterized as "identical in language and legislative purpose" (Pet. App. 49a). The panel majority noted (*id.* at 51a) that, in *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 768 (1961), the Court "held that, under section 2, Eleventh, unions [are] not vested with

'unlimited power to spend exacted money' and they might not use such money to 'support candidates for public office' or to 'advance political programs' " that contributing employees oppose. The panel majority rejected as unconvincing the distinctions that petitioners said existed between Section 2, Eleventh of the RLA and Section 8(a)(3) of the NLRA (Pet. App. 54a-60a), concluding that "the two statutes, * * * phrased similarly and expressive of the same legislative purpose, should be given the same construction" (*id.* at 56a).[4]

The panel majority also rejected petitioners' contention "that [respondents'] action, if sustainable, is within the exclusive jurisdiction of the National Labor Relations Board [(NLRB)]" (Pet. App. 60a). The panel majority ruled that "[t]he conscious use of such funds by the unions on their authority as exclusive bargaining representative under the agency contract negotiated by them with the employer is not only a violation of the statute itself but also a violation of [petitioners'] duty of fair representation" (*ibid.*). And, the majority added, because "an action for violation of the duty of fair representation is not pre-empted by the [NLRA]" (*id.* at 61a), "jurisdiction over [respondents'] statutory suit against defendant union under section 8(a)(3) and for breach

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[4] Petitioners argued, inter alia, that the Court in *Street* gave Section 2, Eleventh of the RLA a "skewed" interpretation in order to avoid a "grave" constitutional question, that Section 8(a)(3) of the NLRA does not raise the same constitutional question, and that section 2, Eleventh and Section 8(a)(3) must each be read against the statutory scheme that had existed prior to its enactment—the former against the RLA provisions prohibiting all union security arrangements, and the latter against the NLRA's allowance of all such arrangements (Pet. App. 56a-59a). The majority rejected these arguments, finding that this Court's interpretation of Section 2, Eleventh was " 'entirely reasonable' " (Pet. App. 57a (citation omitted)), that "there is no difference between a section 8(a)(3) constitutional challenge and the section 2, Eleventh challenge in *Street*" (*id.* at 58a), and that "the language of the two Acts prior to the additions of the provisions in question * * * [cannot] [a]ffect the construction to be given the later amendments" (*id.* at 59a).

of the duty of fair representation * * * properly [lies] * * * under 28 U.S.C. 1337" (*id.* at 62a).[5]

Having found that respondents had stated a good cause of action for breach of the duty of fair representation, the panel majority said that "it would seem unnecessary for us to consider the constitutional basis for jurisdiction" (Pet. App. 65a). Nevertheless, they noted (*ibid.*) that, in *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956), this Court had held that the authorization of the agency shop in Section 2, Eleventh of the RLA constituted governmental action sufficient to support a First Amendment claim. And, the panel majority said, since "section 2, Eleventh and section 8(a)(3) are to be given the same interpretation, then it necessarily follows under *Hanson* that there is [sufficient] governmental action here * * *" (*ibid.*); the majority reasoned that, although an "agency contract, whether under section 2, Eleventh or under section 8(a)(3), is by definition permissive" (*id.* at 66a), when an employer and union "actually * * * execute an agreement under the statute, the obligations cease to be 'permissive' and become compelled under the statute" (*id.* at 66a-67a).

b. Chief Judge Winter dissented (Pet. App. 83a-106a). As to respondents' statutory claim, he argued that "[b]oth the language of [Section] 8(a)(3) and its legislative history show that Congress did not intend to limit the use of agency shop fees under the NLRA" (*id.* at 85a), that "the history and purpose of this provision differs from the history and purpose of the agency shop provision in the [RLA]," and that the RLA's "limits on fee use should not be engrafted onto the NLRA's [Section] 8(a)(3)" (*ibid.*). And, as to respondents' First Amendment claim, he argued that the expenditure of agency fees collected pursuant to a union security agreement does not involve "state action," reasoning that the NLRA "has not compelled the establishment of unions,

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[5] Section 1337 (28 U.S.C.) provides that "[t]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce."

nor has it compelled or even encouraged the adoption of agency shop agreements * * *" (*id.* at 102a), that "[m]onopoly status, which is what the right to be the exclusive bargaining agent gives the union, is by itself insufficient to make [petitioners'] acts state action" (*id.* at 100a), and that "[t]he basis for finding government action in *Hanson*—the federal imprimatur, or mark of approval, on agency shop agreements that the Supreme Court discerned in the preemption of all contrary state law—is lacking in the NLRA" (*id.* at 103a).

4. a. On petition for rehearing, the Fourth Circuit, sitting en banc, vacated the panel decision and, by a six-to-four vote, again affirmed in part, reversed in part, and remanded for further proceedings (Pet. App. 1a-28a). In a per curiam opinion, the court indicated that five judges had "voted that federal jurisdiction 'over [respondents'] statutory suit against defendant union under section 8(a)(3) and for breach of the duty of fair representation was properly invoked under 28 U.S.C. 1337'" (Pet. App. 5a), though "three of these five judges * * * felt it unnecessary to consider whether jurisdiction also existed on constitutional grounds" (*ibid.*).[6] The opinion further said that "Judge Murnaghan, speaking for himself, * * * [had] found that federal jurisdiction existed in this case to decide the [respondents'] claims as violations of the union's statutory duty of fair representation, under *Vaca* v. *Sipes*, 386 U.S. 171 (1967), but * * * agreed with the dissenting panel opinion insofar as it would deny federal jurisdiction on either the statutory or the constitutional grounds" (Pet. App. 5a). Finally, the opinion indicated that all six of these judges had voted to affirm "the majority panel opinion's disposition of the allocation issue" (*id.* at 6a).

b. In his separate concurring opinion (Pet. App. 6a-22a), Judge Murnaghan, while agreeing that "governmental authority cannot be ascribed to the union here"

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[6] The other two judges "were of the opinion that jurisdiction of the cause could also be sustained on the constitutional claim" (Pet. App. 5a).

and that Section "8(a)(3) in itself [does not] prohibit unions from spending agency fees for purposes unrelated to collective bargaining, grievance adjustment, or contract administration" (*id.* at 8a), parted company with "Chief Judge Winter['s] assum[ption] * * * that the scope of the duty of fair representation, as it relates to the use of agency fees, is merely coextensive with the requirements of [Section] 8(a)(3)" (*id.* at 14a). Judge Murnaghan concluded that the duty of fair representation allows a union to "use the fees collected from employees only for purposes within the scope of the agency relationship" (*id.* at 17a), and that, "[w]ith respect to employees who are not members of the union," "the scope of the union's agency function * * * is confined to collective bargaining, contract administration or grievance adjustment" (*ibid.*). He therefore concluded that dissenting non-union member employees' "agency fees may be used only for those purposes" (*ibid.*).

c. Chief Judge Winter, joined by Judges Hall, Phillips, and Sprouse, dissented (Pet. App. 22a-28a). "For the reasons set forth in the dissenting panel opinion," Chief Judge Winter asserted, "the judgment of the district court should be reversed and [the court] should be directed to dismiss the complaint" (*id.* at 22a). In addition, he urged that "Judge Murnaghan's view does not withstand close scrutiny" (*id.* at 23a), reasoning that "the duty of fair representation, derived from [Section] 9 of the Act, cannot be transgressed if a union does only what Congress has intentionally refrained from prohibiting it to do" (*id.* at 24a), and that "the concurring opinion simply fails to appreciate the delicate compromise the Taft-Hartley Act managed to achieve" (*id.* at 27a).

DISCUSSION

Although the judges of the Fourth Circuit were unable to agree on a single rationale, the judgment of that court is clear: employees of an employer subject to the NLRA state a good federal cause of action by the claim that, over their objection, their exclusive bargaining representative expends agency fees collected from them under

a union security provision for non-collective bargaining purposes. This judgment, which casts the legality of collective bargaining agreements covering millions of workers into doubt, conflicts with the decisions of other courts of appeals. This Court's review is warranted.

1. There is substantial conflict among courts of appeals on the question presented. The Second Circuit has held that employees of an employer subject to the NLRA who object to the expenditure of agency fees for non-collective bargaining purposes do not have a good cause of action under either the duty of fair representation or the First Amendment. See *Price* v. *Auto Workers*, 795 F.2d 1128 (1986), petition for cert. pending, No. 86-1055. See also *Reid* v. *McDonnell Douglas Corp.*, 443 F.2d 408 (10th Cir. 1971) (no cause of action under the First Amendment; duty of fair representation issue left open). The Ninth Circuit has held that such a claim states a good cause of action under both the duty of fair representation and the First Amendment. See *Seay* v. *McDonnell Douglas Corp.*, 427 F.2d 996 (1970). As petitioners note (Pet. 9), the conflict is a serious one, since the NLRA covers virtually the entire private employment sector and, in the 30 states that have not enacted right-to-work laws, over 90% of the collective bargaining agreements to which the NLRA applies contain union security provisions. The Court should use this case to resolve the conflict.

2. On the merits, we believe the Fourth Circuit erred. In our view, the employees' claim that, over their objection, petitioners expend their compulsory agency fees for non-collective bargaining purposes does not state a violation of either the duty of fair representation or the First Amendment.[7]

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[7] The en banc court below did not decide the First Amendment question. We nevertheless address it, since respondents are entitled to have the Fourth Circuit's judgment affirmed on any ground raised in that court. The views of the NLRB, however, are limited to the question whether the dues-collection challenged here would constitute an unfair labor practice under the NLRA. Chairman

a. The duty of fair representation is an implied correlative to petitioners' statutory right under Section 9(a) of the NLRA to serve as the exclusive representative for the members of the collective bargaining unit. *DelCostello* v. *International Bhd. of Teamsters*, 462 U.S. 151, 164 & n.14 (1983); *IBEW* v. *Foust*, 442 U.S. 42, 46-47 n.8 (1979); *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 64-65 (1975). The duty requires petitioners "to serve the interests of all members without hostility or discrimination toward any, to exercise [their] discretion with complete good faith and honesty, and to avoid arbitrary conduct" (*Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967)). "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith" (*id.* at 190). Here, five members of the en banc majority concluded (Pet. App. 5a) that petitioners breached their duty of fair representation by using respondents' compulsory agency fees for non-collective bargaining purposes in what the court concluded was a conscious violation of Section 8(a)(3) of the statute, which is applicable to petitioners through Section 8(b)(2). See 29 U.S.C. 158(b)(2) (making it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section"). Judge Murnaghan, who cast the deciding vote, concluded (Pet. App. 5a, 7a-8a, 13a-18a) instead that, while petitioners had not violated Section 8(a)(3) and (b)(2), they had breached their duty of fair representation by so expending respondents' compulsory agency fees.[8] Neither conclusion

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Dotson and Member Johansen of the NLRB agree that certiorari should be granted, but would take no position on the substantive issues before the Court in the case.

[8] It is unclear whether the other five judges in the en banc majority adopted Judge Murnaghan's rationale as well. See Pet. App. 5a & n.2.

can stand against the language and legislative history of Section 8(a)(3).[9]

(1) Section 8(a)(3) makes it unlawful for an employer to "discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" (29 U.S.C. 158(a)(3)). This proscription (and thus Section 8(b)(2)'s corollary proscription) is subject, however, to two provisos. The first proviso, which appeared in the NLRA as originally enacted in 1935 (49 Stat. 452), generally excludes union security agreements from statutory condemnation by stating that:

> nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein * * * if such labor organization is the representative of the employees as provided in section 159(a) of this title * * *.

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[9] "When an activity is arguably subject to [Section] 7 or [Section] 8 of the [NLRA]," courts ordinarily must "yield to the primary jurisdiction of the [NLRB]" (*San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959)). The federal courts may, however, decide unfair labor practice questions that "emerge as collateral issues in suits brought under independent federal remedies" (*Connell Constr. Co.* v. *Plumbers Local Union No. 100*, 421 U.S. 616, 626 (1975)). Federal courts have jurisdiction over claims that a union breached its implied duty of fair representation. *Vaca* v. *Sipes*, 386 U.S. at 188. The need to interpret Section 8(a)(3) and (b)(2) arises as a collateral issue in connection with the duty of fair representation question in this case in two ways: respondents assert a violation of these sections as proof of a violation of the duty of fair representation (see *Lewis* v. *Local No. 100 of Laborers' Int'l Union*, 750 F.2d 1368, 1375-1377 (7th Cir. 1984); see also *Teamsters Local 291*, 236 N.L.R.B. 1100, 1105 (1978)); and petitioners invoke the same provisions as a statutory defense to the duty of fair representation complaint (see *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 83-86 (1982)). We therefore agree that the court below had jurisdiction to interpret Sections 8(a)(3) and 8(b)(2) in deciding this case.

The second proviso, which was added in the Taft-Hartley amendments of 1947 (61 Stat. 141),[10] limits the first proviso by stating that:

> no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

The plain language of these provisos appears to permit an employer (and hence a union) to enter into an agreement requiring all employees, including dissenters, as a condition of their continued employment, to pay uniform periodic dues and initiation fees.[11]

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[10] The Taft-Hartley Act also amended the first proviso to Section 8(a)(3) to provide that a union security agreement may not be applied to an individual until he has been employed for 30 days. See 29 U.S.C. 158(a)(3).

[11] Neither Section 7 nor Section 9(a) of the statute supports the argument that agency fees collected pursuant to a union security agreement may not be used for non-collective bargaining purposes. Section 7 provides a "right to refrain" from engaging in concerted activities, but expressly qualifies that right "to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title" (29 U.S.C. 157). And although Section 9(a) states that a "[r]epresentative[] designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes[] shall be the exclusive representative[] of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment" (29 U.S.C. 159(a)), it is clear that the exclusive representative need not have collective bargaining activities as its sole purpose and that it may engage in activities not enumerated in Section 9(a). See *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 753-754 (1963) (listing non-collective bargaining activities in which exclusive representatives often engage); *NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342, 349-350 (1958) (noting that exclusive representative may bargain with employer concerning subjects not listed in Section 9(a)).

The provisos do not limit, or even address, the purposes to which a union may devote the fees collected pursuant to a union security provision. Nor do they give any employee, union member or not, the right to pay less than the full amount of regular dues and initiation fees charged to all other employees. To the contrary, the second proviso permits an employer to terminate any "employee," pursuant to an agreement permitted by the first proviso, if the employee fails "to tender the periodic dues and initiation fees *uniformly* required as a condition of acquiring or retaining membership" in the union (29 U.S.C. 158(a)(3) (emphasis added)).[12] The term "employee" includes any employee, non-union member as well as union member. See 29 U.S.C. 152(3). Thus, the conclusion of the five judges in the majority below—that Section 8(a)(3) (and therefore Section 8(b)(2)) prohibits petitioners from requiring respondents to pay agency fees for non-collective bargaining purposes—cannot be derived from the plain language of the statute.

Judge Murnaghan's separate argument—that compelling dissenting employees to pay agency fees that are used for non-collective bargaining purposes violates the duty of fair representation *without* violating Section 8(a)(3) (or Section 8(b)(2))—is refuted by the express language of the first proviso. That proviso states that "nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making" any union security agreement allowed by Section 8(a)(3). But the duty of fair representation is an interpretive gloss on Section 9(a) of the statute (see *Emporium Capwell Co.* v. *Community Org.*, 420 U.S. at 64-65). The first proviso to Section 8(a)(3) prevents Section 9(a) from being interpreted to preclude the negotiation or enforcement of any union security agreement allowed by Section 8(a)(3). Hence Judge Murnaghan's acknowledg-

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[12] It is undisputed that the union security agreements at issue here require only that non-union member employees pay an "agency fee" in an "amount equal to the periodic dues" paid by union member employees (Pet. 3; see also Pet. App. 31a-32a).

ment that Section 8(a)(3) does not bar the negotiation or enforcement of the agreements in question here defeats his duty of fair representation argument.

(2) The legislative history of the provisos confirms what the texts suggest: the provisos neither limit the uses to which agency fees may be put nor require dissenters to be charged less than the "uniform" fees. The first proviso was enacted in 1935 as part of Section 8(3) of the original Wagner Act. It was included to make clear that neither the NLRA nor any other federal statute would abridge the preexisting right of an NLRA employer and the representative of his employees to bargain for a closed shop or other form of union security agreement otherwise permitted by state law. See *Algoma Plywood Co.* v. *Wisconsin Employment Relations Bd.*, 336 U.S. 301, 307, 313-314 (1949). The second proviso, together with an amendment to the first proviso (see note 10, *supra*), both of which were added in 1947 by the Taft-Hartley amendments, "abolished the closed shop" and limited "the burdens of membership upon which employment may be conditioned * * * to the payment of initiation fees and monthly dues." *NLRB* v. *General Motors Corp.*, 373 U.S. at 742. Significantly, however, during the enactment of the union security amendments to Section 8(a)(3), Congress chose, in the course of a well documented Senate-House compromise, not to place any general federal restrictions on the uses of fees so collected. See *Detroit Mailers Union No. 40*, 192 N.L.R.B. 951, 951-952 (1971). Rather, except where it expressly stated to the contrary, Congress elected to leave the regulation of the collection and use of dues and dues-equivalents through union security agreements to the states. See *Retail Clerks* v. *Schermerhorn*, 373 U.S. 746, 750-754 (1963).

The union security amendments to Section 8(a)(3) originated in the Senate Committee on Labor and Public Welfare. See S. 1126, 80th Cong., 1st Sess. § 8(a)(3) (1947) *reprinted in* 1 NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 99, 110-111 (GPO 1948) [hereinafter *Leg. Hist.*]. That Committee,

in reviewing complaints concerning the use of union security agreements, determined that "the closed shop[,] which requires preexisting union membership as a condition of obtaining employment[,] creates too great a barrier to free employment to be longer tolerated" (S. Rep. 105, 80th Cong., 1st Sess. 6 (1947); 1 *Leg. Hist.* 412). The Committee found that the closed shop "deprives management of any real choice of the men it hires" and gives union leaders "a method of depriving employees of their jobs, and in some cases [of] a means of securing a livelihood in their trade or calling, for purely capricious reasons" (*ibid.*). It understood, however, "that in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the cost" (*ibid.*). Thus, it agreed that unions and employers should be permitted "to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired," but proposed that they be allowed to secure an employee's discharge pursuant to such an agreement only if, inter alia, "[m]embership in the union [was] available to [the] employee on the same terms and conditions generally applicable to other members" and the worker was "delinquent in paying his initiation fee or dues" (S. Rep. 105, *supra*, at 7; 1 *Leg. Hist.* 413).[13]

Senator Taft, the chairman of the Committee and the chief sponsor of the bill, explained (93 Cong. Rec. 4876 (1947); 2 *Leg. Hist.* 1403) that the bill took a position "in the middle." On the one hand, he noted (93 Cong. Rec. 4886; 2 *Leg. Hist.* 1421), it proscribed the closed shop, because "if an employer can only employ union members, there is no freedom of labor." On the other

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[13] The Committee found this to be the most workable approach to the regulation of union security agreements, noting (S. Rep. 105, *supra*, at 20; 1 *Leg. Hist.* 426 (emphasis added)) that the litmus "tests" for determining when an employee could be discharged "are based upon facts readily ascertainable and *do not require the employer to inquire into the internal affairs of the union.*"

hand, he added (93 Cong. Rec. 3837; 2 *Leg. Hist.* 1010), the bill preserved the union shop, because "the union shop has been in force in many industries for many years, and to upset it today probably would destroy relationships of long standing and probably would bring on more strikes than it would cure." See also 93 Cong. Rec. 4885; 2 *Leg. Hist.* 1420. Thus, Senator Taft explained (93 Cong. Rec. 4887; 2 *Leg. Hist.* 1422) that:

> the rule adopted by the committee is substantially the rule now in effect in Canada * * *. [T]he present rule in Canada is that * * * the employee must, nevertheless, pay dues, even though he does not join the union.[14]
>
> If he pays the dues without joining the union, he has the right to be employed. * * *

Senator Taft asserted (*ibid.*) that, "[u]nder the Canadian rule, and under the rule of the [C]ommittee, we pretty well take care of [the] argument" that, "if there is not a closed shop[,] those not in the union will get a free ride." And he emphasized (93 Cong. Rec. 4886; 2 *Leg. Hist* 1422) that the bill resolved the most serious abuses of the closed shop, principally by ensuring that "a man can get a job without joining the union or asking favors of the union * * *. The fact that the employee will have to pay dues to the union seems to me to be much less important."

The House was troubled by the problem of the worker who "has been compelled to contribute to causes and candidates for public office to which he [is] opposed." H.R. Rep. 245, 80th Cong., 1st Sess. 4 (1947); 1 *Leg. Hist.* 295. Accordingly, it approved a bill declaring that

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[14] The Canadian rule to which Senator Taft referred was the so-called "Rand formula," a widely known interest arbitration decision by Justice Rand of the Supreme Court of Canada. See *Ford Motor Co.*, 1 Lab. Arb. (BNA) 439 (1946). That decision denied the United Auto Worker's request for a full union shop with the Ford Motor Company of Canada, but directed a check-off of an amount equal to union dues, but not including special assessments, for all employees in the bargaining unit, including non-union members (*id.* at 445-446).

"[m]embers of any labor organization shall have the right to be free from unreasonable or discriminatory financial demands of such organization" (H.R. 3020, 80th Cong., 1st Sess. § 7(b) (1947); 1 *Leg. Hist.* 176). The bill made it an unfair labor practice for a union "to impose any dues or general or special assessments that * * * are in excess of such reasonable amounts as the members thereof * * * shall authorize * * *," or "to fine or discriminate against any member * * * on account of his having supported or failed to support any candidate for civil office * * *" (H.R. 3020, *supra*, § 8(c)(2) and (5); 1 *Leg. Hist.* 179-180).

When the Conference Committee met to reconcile the two bills, the Senate conferees refused to accept the provisions in the House bill that proposed to regulate the "reasonableness" of union dues. Senator Taft explained (93 Cong. Rec. 6443; 2 *Leg. Hist.* 1540) that the conferees believed that:

> it was unwise to authorize an agency of the Government to undertake such elaborate policing of the internal affairs of unions as this section contemplated * * *. In the opinion of the Senate conferees[,] the language which protected an employee from losing his job if a union expelled him for some reason other than nonpayment of dues and initiation fees, uniformly required of all members, was considered sufficient protection.

Senator Taft noted, however, that the Senate conferees agreed that some safeguard was needed to prevent unions from charging new members exorbitant initiation fees and thereby maintaining their monopolies over certain trades. *Ibid.* Hence, the Conference Committee added Section 8(b)(5) to the final bill, which makes it an unfair labor practice for unions to require initiation fees that the NLRB "finds excessive or discriminatory under the circumstances" (29 U.S.C. 158(b)(5)). But, even here, the Senate passed new Section 8(b)(5) only after receiving assurances from Senator Taft that it would not allow the NLRB to regulate union expenditures. Com-

pare 93 Cong. Rec. 6503; 2 *Leg. Hist.* 1579 (Sen. Murray); 93 Cong. Rec. 6514; 2 *Leg. Hist.* 1589-1590 (Sen. Pepper), with 93 Cong. Rec. 6859; 2 *Leg. Hist.* 1623 (Sen. Taft).

In striking the provisions of the House bill that would have instructed the NLRB generally to regulate the "reasonableness" of union fees or expenditures, the Conference Committee emphasized, however, that it was not affirmatively endorsing the use of union security agreements or the compelled payment of agency fees. See H.R. Conf. Rep. 510, 80th Cong., 1st Sess. 60 (1947); 1 *Leg. Hist.* 564. It noted (*ibid.*) that "[m]any States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in these States illegal" and that "[i]t was never the intention of the [NLRA] * * * to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism." Accordingly, it added Section 14(b) to to the final bill, which as enacted states (29 U.S.C. 164 (b)) that "[n]othing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law," to make clear that the amendments to Section 8(a)(3) did not alter the states' power to regulate union security agreements, including the use of fees collected from employees pursuant to a union security agreement. See *Retail Clerks* v. *Schermerhorn*, 373 U.S. at 751.

In sum, the legislative history of Taft-Hartley cannot be reconciled with the argument that the statute—either expressly in Sections 8(a)(3) and 8(b)(2) or impliedly by way of the duty of fair representation—precludes an employer and a union from agreeing to require both union member and non-union member employees to pay uniform fees that the union may use for both collective bargaining and non-collective bargaining purposes. In 1947, Congress was principally concerned with insulating

workers' jobs from capricious actions by union leaders. Congress understood that, by eliminating the closed shop, it might create a "free rider" problem, and it therefore provided that non-union member employees may be required to pay the equivalent of union dues. But it rejected proposals to place general federal restrictions on either the dues-equivalents that employees may be required to pay or the uses to which unions may put such dues-equivalents. Rather, though it was well aware that union dues are used for "a variety of purposes in addition to meeting the union's costs of collective bargaining'" (*Retail Clerks* v. *Schermerhorn*, 373 U.S. at 754 (citation omitted)), Congress only banned unions from using union security provisions to exact more than the initiation fees and "periodic dues" uniformly required as conditions of union membership.[15] Otherwise,

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[15] In *Pattern Makers' League* v. *NLRB*, 473 U.S. 95 (1985), the Court held that the NLRB has reasonably construed Section 8(b)(1)(A) of the statute to prohibit a union from fining employees for attempting to resign from the union. The Court reasoned that Section 8(b)(1)(A), which prohibits a union from "restrain[ing] or coerc[ing] * * * employees in the exercise" of their Section 7 rights, allows unions to enforce only those membership rules that do not impair any policy embodied in the NLRA, that implicit in Section 7 and Section 8(a)(3) is a policy of "voluntary unionism," and that restrictions on the right to resign, including fines, are inconsistent with that policy of voluntary unionism. The Court rejected arguments that the text and legislative history of the Taft-Hartley amendments bar this construction of the statute, finding that restrictions on the right to resign are not "rules with respect to the acquisition or retention of membership therein," which are shielded by a proviso to Section 8(b)(1)(A), and that Congress's failure in 1947 to enact a House proposal that would have prevented unions from restricting employees' right to resign was the result of perceived legislative redundancy, not of legislative compromise. Finally, the Court held that the validity of restrictions on the right to resign must be judged against the language, legislative history, and purpose of the NLRA, and not against the common law of voluntary associations.

Pattern Makers does not support respondents' argument here. In respect of the issue in this case, the policy of voluntary unionism is expressly limited by the exceptions in Sections 7 and 8(a)(3)

it determined that the regulation of union security agreements should be left to specific federal legislation and to the legislatures and courts of the several states.[16]

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for permitted union security agreements. Moreover, Section 8(a)(3) explicitly characterizes a requirement under a union security agreement that employees submit "periodic dues" as a rule "with respect to the acquisition or retention of membership." Furthermore, Congress's decision in 1947 not to impose limits on the dues that may be exacted through a union security agreement, or the uses to which those dues may be put, was, as shown in text, the result of a well-documented Senate-House compromise. Finally, with the exception of a few specific federal limitations, the NLRA generally makes the validity of union security agreements a matter of state common (and statutory) law. Thus, whereas the NLRB's position in *Pattern Makers* was firmly anchored in the statute, respondents' position here is not. See also *NLRB* v. *Boeing*, 412 U.S. 67 (1973) (Section 8(b)(1)(A) cannot reasonably be construed to authorize the NLRB to determine whether the amount of a disciplinary fine imposed by a union against one of its members is reasonable).

[16] Congress has, of course, imposed several specific limits on the collection and expenditure of fees and dues exacted from bargaining unit employees. In Section 304 of the Labor-Management Relations (Taft-Hartley) Act, 1947, ch. 120, 61 Stat. 159-160, which is now incorporated in the Federal Election Campaign Act (see 2 U.S.C. 441b), Congress made it unlawful for a union "to make a contribution or expenditure in connection with" any political election, primary, or political convention. In Section 101(a)(3) and Section 501(a) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 411(a)(3), 501(a)), Congress established procedures to be followed in setting periodic dues and imposed fiduciary obligations or union officers in the expenditures of funds so collected. In Section 19 of the NLRA (29 U.S.C. 169), added to the statute in 1980, Congress exempted members of conscientiously objecting religious groups from joining or financially supporting any labor organization as a condition of employment, except that, where a union security agreement is in force, such employees may be required "in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious, nonlabor organization charitable fund exempt from taxation under section 501(c)(3) of title 26 * * *." We also note that approximately twenty states have in fact imposed some sort of limits on the union security agreements that are permitted in their jurisdictions. See 2 C. Morris, *The Developing Labor Law* 1391-1392 (2d ed. 1983).

(4) The text of Section 8(a)(3) of the NLRA is, of course, quite similar to the text of Section 2, Eleventh of the RLA (45 U.S.C. 152).[17] This Court, in *International Ass'n of Machinists* v. *Street*, 367 U.S. 740 (1961), interpreted Section 2, Eleventh to preclude the use of monies collected from nonmembers pursuant to a union security clause for non-collective bargaining purposes. See also *Ellis* v. *Brotherhood of Ry. Clerks*, 466 U.S. 435 (1984). But, as Chief Judge Winter stated in his panel dissent (Pet. App. 91a-97a), the premises on which the *Street* Court rested its interpretation of Section 2, Eleventh are missing in the context of the NLRA.

First, in interpreting Section 2, Eleventh, the *Street* Court perceived (367 U.S. at 749-750) that it was acting in the shadow of a serious First Amendment question. The *Street* Court read (*id.* at 749) the decision in *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956), to establish that, because the RLA preempts state right-to-work laws, the negotiation and implementation of union security agreements in the railway industry involves "governmental action" subject to constitutional restraints. See also *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 218 n.12 (1977). As explained below (see pages 24-30, *infra*),

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[17] Section 2, Eleventh of the RLA (45 U.S.C. 152) provides, in pertinent part, that:

> Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that * * * all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment * * * with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

we see no comparable First Amendment question in the context of the NLRA. Section 14(b) of the NLRA expressly provides that the NLRA does *not* preempt state law, and thus union security arrangements permitted by Section 8(a)(3) may nevertheless be prohibited by the states; and there is no other basis for finding that the negotiation and implementation of a union security agreement containing terms permitted by Section 8(a)(3) involves "state action."

Second, the *Street* Court's interpretation of Section 2, Eleventh was influenced by the "open shop" history of the railway industry (see 367 U.S. at 766-770). The *Street* Court found (*id.* at 750-751 (emphasis in original; footnote omitted)) that:

> The history of union security in the railway industry is marked *first*, by a strong and long-standing tradition of voluntary unionism on the part of the standard rail unions; *second*, by the declaration in 1934 of a congressional policy of complete freedom of choice of employees to join or not to join a union; [and] *third*, by the modification of the first legislative policy against compulsion, but only as a specific response to the recognition of the expenses and burdens incurred by the unions in the administration of the complex scheme of the Railway Labor Act.

In industries covered by the NLRA, the history of union security agreements was quite different. Prior to 1947, employers and unions had long included union security provisions in their collective agreements; indeed, from 1935-1947, Congress expressly permitted all forms of union security not invalid under applicable state law, included the closed shop. Congress in 1947 attempted to remedy the most serious abuses of the closed shop, but to read the legislation adopted in 1947 as also prohibiting the forced exaction of agency fees that may be used for non-collective bargaining purposes is to suggest that the 1947 legislation made a more dramatic change than the evidence will support. See *NLRB* v. *General Motors Corp.*, 373 U.S. at 738-744; *Retail Clerks* v. *Schermerhorn*, 373 U.S. at 750-754. Thus, the historical considera-

tions that underlay the *Street* decision point in a quite different direction than does the history of the NLRA.

Finally, dissenting employees in industries covered by the NLRA do have various means, unavailable to their counterparts under the RLA, for challenging their exclusive representative's use of their compelled agency fees. First, unlike the RLA, the NLRA, in Section 14(b), expressly reserves to the states the right to regulate union security agreements. See 29 U.S.C. 164(b). Dissenting employees may well have rights under common or statutory law of the state in which they work to prevent the exaction of fees for non-collective bargaining purposes. See generally *Oil Workers* v. *Mobil Oil Corp.*, 426 U.S. 407, 416-417 (1976); *id.* at 424-427 (Stewart, J., dissenting). Second, in contrast to the RLA, the NLRA does not allow an employer and a union to condition employment on the payment of uniform special "assessments" —as opposed to "periodic dues"—to the union. See *NLRB* v. *Food Fair Stores*, 307 F.2d 3, 9-16 (3d Cir. 1962); *International Harvester Co.*, 95 N.L.R.B. 730 (1951). One factor that the NLRB considers in distinguishing between "assessments" and "periodic dues" is the purpose for which the union has collected the funds in issue. See *Detroit Mailers Union No. 40*, 192 N.L.R.B. at 952; *Local 959, Teamsters (RCA Service Co.)*, 167 N.L.R.B. 1042, 1044-1045 (1967). Thus, at least some forced exactions may—in part because of the particular non-collective bargaining purposes for which they are used—not be "periodic dues" at all. See, *e.g.*, *Welsbach Elec. Corp.*, 236 N.L.R.B. 503 (1978) (regular exaction to support loan fund for unemployed workers is unlawful "assessment"); *Local 959, Teamsters (RCA Service Co.)*, 167 N.L.R.B. 1042 (1967) (levy designed to support union's credit union and building programs is an "assessment").[18]

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[18] There are also, of course, kinds of conduct involving the expenditure of dues that would violate the NLRA. A union would breach its duty of fair representation if it spent such funds with an arbitrary, discriminatory, or bad faith purpose—*e.g.*, with the intent of driving the employee out of the work force or bargaining

b. Nor do we believe that respondents state a good cause of action for violation of the First Amendment by the claim that, over their objection, petitioners expend their compulsory agency fees for non-collective bargaining purposes. Essential to any First Amendment claim is a finding that the conduct challenged constitutes "state action." *Hudgens* v. *NLRB*, 424 U.S. 507, 513 (1976). State action, however, may be said to exist only when "the conduct allegedly causing the deprivation of a federal right [may] be fairly attributable to the State" (*Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). No such attribution is possible here.

All conduct leading to the expenditure of agency fees secured through a union security agreement on non-collective bargaining matters is a consequence of private choice and initiative. Employees form unions on their own initiative. Unions are not instructed or encouraged (but merely permitted) to seek union security agreements that provide for the collection of agency fees. And the government plays no general role in determining how funds collected pursuant to a union security agreement are spent. Employers and unions established all types of union security agreements—closed shops, union shops, and agency shops—before the NLRA was enacted. No

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unit. See *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976). Likewise, a union would violate Section 8(b)(1)(A) of the statute if it attempted to secure the discharge of an employee who refused to support illegal activities of the union. *See Scofield* v. *NLRB*, 394 U.S. 423, 429 (1969). And it may be that the provisos to Section 8(a)(3) (and thus to Section 8(b)(2)) would not allow an employer and union to agree to condition employees' job rights on the financial support of activities that are found to be wholly outside of the scope of Section 7's guarantees, because, for example, they have no relationship at all to employees' interests and concerns as employees. See *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 567-568, 570 n.20 (1978); *Ford Motor Co.*, 221 N.L.R.B. 663, 666 (1975); cf. Cantor, *Uses and Abuses of the Agency Shop*, 59 Notre Dame L. Rev. 61, 75 (1983) (suggesting that the statute permits the NLRB and the courts to prohibit a union from expending compelled fees for purposes that cannot "reasonably be said to be aimed at producing job-related benefits"). Respondents do not appear to have advanced any such claims in this case.

governmental action was involved or required then; no governmental action is involved or required now.

Under this Court's precedents, the fact that the NLRA excludes union security agreements from statutory condemnation, while making other employer and union conduct unlawful, is not a sufficient basis for treating either those agreements or the expenditure of funds collected pursuant thereto as acts involving "government action." The "exercise of the choice allowed by * * * law[,] where the initiative comes from [a private party] and not from the State, does not make its action in doing so 'state action' * * *" (*Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974)). See also *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 160 n.10, 164-166 (1978); *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 841-842 (1982); *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). Rather, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the State" (*ibid.*). No such coercion or significant encouragement exists here.[19]

Nor does the fact that the NLRA confers "exclusive" status on the bargaining representative selected in accordance with the Act's provisions mean that the negotiation of a permitted union security agreement or the expenditure of the agency fees collected pursuant thereto

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[19] This case does not involve court or NLRB action to compel an employer or union to comply with its union security agreement. Nevertheless, we note that such compulsion would not add the required element of governmental action. See *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 402 (1950); *Black* v. *Cutter Laboratories*, 351 U.S. 292, 298-299 (1956). Although the Court has found the Fourteenth Amendment offended by the governmental activity of enforcing racially discriminatory covenants in housing subdivisions (see *Shelley* v. *Kraemer*, 334 U.S. 1 (1948)), there are large numbers of private contracts that restrict speech or association in ways that would not be permissible for government, but such contracts are not therefore unenforceable. See generally *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922, 939 n.21, 942 (1982); *Evans* v. *Abney*, 396 U.S. 435, 445-447 (1970).

involves governmental action. This Court has long held that the mere exercise of a statutorily conferred cartel power, without more, does not constitute "state action." See *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 351-352; *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172-177 (1972); cf. *Blum* v. *Yaretsky*, 457 U.S. at 1003-1012 (employment decisions of private entity are not rendered "governmental acts" by virtue of the state's extensive regulation and subsidization of that entity); *Rendell-Baker* v. *Kohn*, 457 U.S. at 840-842 (same). Thus, while the Court has compared the acts of an exclusive representative to the acts of a governmental body (see, *e.g.*, *NLRB* v. *Allis-Chalmers Mfg.*, 388 U.S. 175, 180 (1967)), it has also twice refused to find that acts of a union in an industry governed by the NLRA are subject to constitutional restraints. See *United Steelworkers* v. *Weber*, 443 U.S. 193, 200 (1979); *United Steelworkers* v. *Sadlowski*, 457 U.S. 102, 121 n.16 (1982). We see no persuasive reason for treating union security agreements differently.

c. Although we think it clear that, under the main line of "state action" doctrine, there is no state action here, the Court's agency fee cases under the RLA do give us serious pause. As in the NLRA context, employees in the railroad and airline industries form unions on their own initiative. Those unions seek to establish union security agreements without instruction or encouragement by the state. And the state plays no role in determining how the funds collected pursuant to a union security agreement will be spent. Nevertheless, the Court has said that there is "governmental action" involved in the negotiation and implementation of RLA agency fee agreements. See *Railway Employes' Dep't* v. *Hanson*, 351 U.S. at 231-232; *Machinists* v. *Street*, 367 U.S. at 749-750; *Ellis* v. *Ry. Clerks*, 466 U.S. at 455-457. It is not easy to distinguish these RLA cases from the present case.

The Court's conclusion that "government action" was involved in the RLA cases was said, in the opinions in those cases, to rest on a factor that is not present here:

the RLA's preemption of contrary state right-to-work laws. By preempting state right-to-work laws, the RLA legalizes otherwise unlawful private action and is thus said to give union security agreements the imprimatur of federal law. See *Railway Employes' Dep't* v. *Hanson*, 351 U.S. at 232; see also *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. at 218 n.12. In candor, we do not find the presence of preemption a satisfactory basis either for distinguishing the RLA cases from the present case or for finding governmental action in the first place. There are many situations in which federal law ousts contrary state law and permits private conduct, yet to our knowledge the Court has never intimated (except in *Hanson*) that such conduct becomes governmental by virtue of the operation of the Supremacy Clause. Indeed, at least one respected commentator has suggested that the operation of the Supremacy Clause is not an appropriate basis for finding "governmental action," reasoning that the Supremacy Clause was fashioned to cope with problems entirely unrelated to the question of when constitutional restraints should apply to private actions, and that using it to make "state action" distinctions will unduly limit the sphere of private action subject only to legislative restraint. See Wellington, *The Constitution, The Labor Union, and "Governmental Action"*, 70 Yale L.J. 345, 355-357, 361-371 (1961). Thus, while the NLRA's preservation of state right-to-work laws is an obvious basis for distinction, we find it an unsatisfactory one, and therefore are concerned that we have misunderstood the Court's rationale for finding "state action" in the RLA cases.

In particular, the line of cases from *Hanson* to *Ellis*, while dealing only with RLA employers and public employers, obviously reflects a more general concern about conditioning something as significant as employment on the compromise of interests in expression and association. The Court has noted in the RLA context that it is said that "the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and free-

dom of thought * * *'" (*Railway Employes' Dep't* v. *Hanson*, 351 U.S. at 236). The Court has expressed concern in the public employer context that requiring nonunion employees to help finance the union as a collective bargaining agent may well be thought "to 'interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit'" (*Chicago Teachers Union Local No. 1* v. *Hudson*, No. 84-1503 (Mar. 4, 1986), slip op. 8 (quoting *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977)). And it has at least been intimated, in the RLA and public employer cases, that requiring an individual, as a condition of employment, to finance non-collective bargaining causes with which he disagrees may be so inherently at odds with First Amendment values that even the government's express *permission* to an exclusive bargaining representative to impose such requirements may constitute "governmental action." See *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. at 226-227; *Machinists* v *Street*, 367 U.S. at 777 & n.3 (Douglas, J., concurring); *Lewis* v. *American Fed'n of Television & Radio Artists*, 419 U.S. 1093, 1094-1095 (1974) (Douglas, J., dissenting); cf. *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Shelley* v. *Kraemer*, 334 U.S. 1 (1948).[20]

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[20] The Court has, of course, also acknowledged Congress's judgment that, by preventing free-riders, union security agreements contribute to industrial peace and labor-management stability (see *Railway Employes' Dep't* v. *Hanson*, 351 U.S. at 233-235) and has held that a nonunion employee may be required both to accept the terms and conditions of employment negotiated by an exclusive representative and to pay a fair share of that representative's collective bargaining costs (see *Ellis* v. *Ry. Clerks*, 466 U.S. at 455-456). The Court has said that, where there is sufficient state action to implicate constitutional limitations, the free-rider rationale justifies compelling financial support only for collective bargaining purposes. See *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. at 221-223, 232-237; *Machinists* v. *Street*, 367 U.S. at 761-764. Dissenting justices, by contrast, have contended that unions must engage in non-collective bargaining activities to represent adequately workers' interests and that the free-rider rationale thus applies to expenditures for those purposes as well. See *id.* at 811-816 (Frankfurter, J., dissenting).

This is a path down which, in our view, the Court should not travel any further. Congress often adopts a "hands-off" policy to private conduct which, if undertaken by the government itself, might be constitutionally offensive. This "hands-off" policy, when adopted, reflects Congress's judgment either that such conduct is inoffensive when only private persons are involved or (as Congress clearly decided on the present issue when it enacted Taft-Hartley) that the benefits of coercive intervention by government are outweighed by the benefits of preserving the freedom of private actors. Treating Congress's decision *not* to prohibit particular conduct as a basis for finding "governmental action" would both usurp this legislative judgment and subject private actors to constitutional restraints that are not designed to restrain them at all. See *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 349; *Lugar* v. *Edmondson Oil Co.*, 457 U.S. at 936-937; see generally Wellington, *supra*, 70 Yale L.J. at 361-371. This Court has accordingly stated that "[i]t would intolerably broaden * * * the notion of state action * * * to hold that the mere existence of a body of * * * law * * *, whether decisional or statutory, itself amounts to 'state action'[,] even though no state process or state officials were ever involved in enforcing that body of law." *Flagg Bros.* v. *Brooks*, 436 U.S. at 160 n.10; see also *id.* at 164-166.

An extension of "state action" doctrine to reach Congress's decision *not* to forbid agency shop agreements and *not* to restrict unions' use of their proceeds would be inconsistent with cases finding no state action in contexts that are not easy to distinguish. For example, a union-negotiated no-strike clause or no-solicitation rule also limits expressive activity, but the Court has properly declined to find "state action" in those contexts. See *Steelworkers* v. *Sadlowski*, 457 U.S. at 121 n.16 (union's rule prohibiting candidates for union office from accepting contributions from non-members is not "state action"); cf. *Boys Mkts., Inc.* v. *Retail Clerks*, 398 U.S. 235 (1970) (federal court may enjoin strike and picketing activity undertaken in violation of no-strike and ar-

bitrability clauses of collective bargaining agreement). Statutorily sanctioned union activity also affects other interests that have a constitutional dimension, such as the rights to equal treatment without regard to race or gender, and to procedural due process; but again, the Court has found that union activity touching these interests did not involve state action. See *Steelworkers* v. *Weber*, 443 U.S. at 200 (collectively bargained affirmative action plan does not constitute state action). Nor is it easy to distinguish between unions and other entities whose existence or power is partially due to statute, but the Court has routinely held that, for example, public utilities, broadcasters, licensed professionals and other entities are not "state actors" by virtue of their state charters or licenses. See *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 349 (public utility); *Columbia Broadcasting Sys.* v. *Democratic Nat'l Comm.*, 412 U.S. 94, 114-121 (1973) (plurality opinion) (licensed broadcasters).[21] We believe that the Court spoke wisely when it said that "[c]areful adherence to the 'state action' requirement" is vital so as to "preserve[] an area of individual freedom by limiting the reach of federal law and federal judicial power" (*Lugar* v. *Edmondson Oil Co.*, 457 U.S. at 936), and therefore that the Court should decline to find state action in connection with union security agreements in the NLRA context.[22]

[21] There have, of course, been suggestions for an enlargement of the concept of state action to include state-chartered entities. See Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. Pa. L. Rev. 933 (1952).

[22] After the Court invited the Solicitor General to express the views of the United States, respondents filed a cross-petition for certiorari in this case. See *Beck* v. *CWA*, No. 86-966 (filed Dec. 11, 1986). The cross-petition raises various questions concerning the adequacy of the remedy provided by the district court and approved by the court of appeals. We suggest that the Court hold the cross-petition pending the resolution of the question presented by the petition. If the Court agrees with our resolution of the merits of that question, the cross-petition will become moot. If the Court disagrees with our resolution of the merits, it can then determine whether the questions raised by cross-petition are independently worthy of review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1987

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No. 86-637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COMMUNICATIONS WORKERS OF AMERICA AND ITS LOCALS 2100, 2101, 2108 AND 2110,
Petitioners,

v.

HARRY E. BECK, JR., *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 16, 1986
CERTIORARI GRANTED JUNE 1, 1987

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Docket No. M76-839

HARRY E. BECK, JR.; DORIS R. AMBROSE; JACQUELINE S. BRANDON; MARY ANNA COX; SALLY B. DiMAURO; RUE T.F. DOWNEY; KATHLEEN A. HEIL; JOHN J. HURLEY; HARRIET LIPSCHULTZ; CLAY B. LUTZ; BARBARA McGAUGHEY; ROLAND R. MERKLE; ETHEL T. MERRYMAN; DORIS J. MORROW; MARION F. NORTHROP; FRANCES M. PHILIPS; VIVIAN REEDY; BARBARA A. RUSSELL; LOIS A. STALLINGS; HARRY B. SWARTZ, SR.,

Plaintiffs

v.

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), AN UNINCORPORATED LABOR ORGANIZATION; C.W.A. COMMITTEE ON POLITICAL EDUCATION (C.W.A. COPE), C.W.A. DISTRICT II; LOCAL 2100 OF C.W.A.; LOCAL 2101 OF C.W.A.; LOCAL 2108 OF C.W.A.; LOCAL 2110 OF C.W.A.; LOCAL 2350 OF C.W.A.; AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), A FEDERATION OF NATIONAL AND INTERNATIONAL LABOR ORGANIZATIONS; AFL-CIO COMMITTEE ON POLITICAL EDUCATION; MARYLAND STATE AFL-CIO; AMERICAN TELEPHONE & TELEGRAPH, A CORPORATION; C & P TELEPHONE COMPANY OF MARYLAND, A CORPORATION,

Defendants

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1976		
June 4	(1)	Complaint and Exhibits A-1 through D-40.

DATE	NR.	PROCEEDINGS
1976		
June 4	(2)	Summons issued as to Defendants American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), etc.; AFL-CIO Committee on Political Education; Communications Workers of America (C.W.A.), etc.; C.W.A. Committee on Political Education (C.W.A. COPE); C.W.A. District II pursuant to Maryland Rule 107 (Long Arm Statute). (cc's to Marshal) (All Served see Marshal's Returns)
" 8	(3)	Summons issued as to Defendants Local 2101 of C.W.A.; Local 2108 of C.W.A.; Local 2110 of C.W.A.; Local 2350 of C.W.A.; Maryland State AFL-CIO; American Telephone & Telegraph, etc.; C & P Telephone Company of Maryland, etc. (copies to Attorney for Plaintiffs for service pursuant to Local Rule 25).
July 6	(4)	Correspondence from Charles P. Featherstun, Esq. to Paul R. Schlitz, Esq. Re: Resident Counsel.
" "	(5)	Motion of American Telephone and Telegraph Company and The Chesapeake and Potomac Telephone Company of Maryland, to Dismiss, Points and Authorities in support thereof and Proposed Order. (c/s)
" "	(6)	Motion of Plaintiffs for Summary Judgment. (c/s)
" 8	(7)	Correspondence from Hugh L. Reilly, Esq. to Paul R. Schlitz, Esq., Re: Resident Counsel.
" 12	(8)	Copy of Correspondence from Paul R. Schlitz, Esq. to Hugh L. Reilly, Esq. Re: Retain Resident Counsel.

***

DATE	NR.	PROCEEDINGS
1976		
July 23	(9)	Appearance of Matthew A. Kane, Esquire, Charles V. Koons, Esquire as counsel for Communications Workers of America, CWA COPE, CWA District 2, CWA Local 2100, 2101, 2108, 2110 and 2350 and that responsive pleadings shall be filed to complaint on or before August 30, 1976.
***		
July 20	(8a)	Correspondence from Hugh L. Reilly, Esq. to Paul R. Schlitz, Esq. RE: Resident Counsel.
July 23	(10)	Stipulation of counsel that Plaintiffs may have until August 30, 1976 to file Opposition to Motion of C&P Telephone Company etc. to Dismiss.
July 26	(11)	Copy of correspondence from Paul R. Schlitz, Esq to Hugh L. Reilly, Esq. RE: Resident Counsel.
July 27	(12)	Appearance of Bernard W. Rubenstein, Esquire as counsel for Ameriacn Federation of Labor-Congress of Industrial Organizations (AFL-CIO), AFL-CIO Committee on Political Education (COPE) and the Maryland State AFL-CIO.
Aug. 3	(13)	Stipulation of Counsel extending the time within which American Federation of Labor, etc. shall file responsive pleading to and including August 30, 1976.
Aug. 27	(14)	Response of Maryland State AFL-CIO to the motion of plaintiff for summary judgment and memorandum in support thereof. (c/s)
" "	(15)	Response of AFL-CIO and AFL-CIO COPE to the motion of plaintiff for summary judgment and memorandum in support thereof. (c/s)

DATE	NR.	PROCEEDINGS
1976		
Aug. 27	(16)	ANSWER of Maryland State AFL-CIO.
" "	(17)	ANSWER of AFL-CIO and AFL-CIO COPE.
" 30	(18)	ANSWER of Communications Workers of America (CWA), CWA COPE, CWA District II, and CWA Locals 2100, 2101, 2108, 2110 and 2350.
" "	(19)	Motion of Communications Workers of America (CWA), CWA COPE, CWA District II, and CWA Locals 2100, 2101, 2108, 2110 and 2350 to dismiss Count VI, to stay, or to sever and transfer Count VI to the United States District Court for the District of Columbia, points and authorities in support thereof, and attachments A and B. (c/s)
Sept. 3	(20)	Opposition of plaintiff to motion of American Telephone and Telegraph Company and Chesapeake and Potomac Telephone Company of Maryland to dismiss and request for hearing. (c/s)
" 13	(21)	Reply of plaintiff to motions of defendant to dismiss, for summary judgment, to stay and/or to transfer Count VI and request for oral argument. (c/s)
1977		
Apr 13	(22)	Memorandum and Order (Blair, J.) "GRANTING" motion of American Telephone and Telegraph Company and Chesapeake and Potomac Telegraph Company to dismiss. (c/m)
May 10	(23)	Interrogatories of Plaintiffs propounded to certain Defendants.

DATE	NR.	PROCEEDINGS
1977		
May 13	(24)	Motion of Plaintiffs for Reconsideration or for Certification under F. R. Civ. P. 54(b). (c/s)
" "	(25)	Order (Blair, J.) entered at Preliminary Conference. (c/delivered)
" 23	(26)	Opposition of American Telephone and Telegraph Company and Chesapeake Potomac Telegraph Company, two of the defendants, to plaintiffs' motion for reconsideration or for certification under F. R. CIV. P. 54(b).
" 25	(27)	Memorandum and Order (Blair, J.) "DENYING" plaintiffs' motions for reconsideration and certification. (c/m)
" 31	(28)	Reply of plaintiffs to the opposition of American Telephone and Telegraph Company and the Chesapeake and Potomac Telephone Company of Maryland to plaintiffs' motion for reconsideration and certification. (c/s)
June 29	(29)	Request (First) of Plaintiff for Production of Documents by Communications Workers of America Local Unions 2100, 2101, 2108, 2110 and 2350.
" "	(30)	Request (First) of Plaintiff for Admissions by Communications Workers of America Communications Workers of America District to Communication Workers or Americal Local Unions, and Communications Workers of America Committee on Public Education.
" 30	(31)	Interrogatories of Plaintiffs propounded to Communication Workers of America, Communication Workers of America Dis-

DATE	NR.	PROCEEDINGS
1977		
		trict II, Communication Workers of America Committee on Political Education and Communication Workers of America Locals 2100, 2101, 2108, 2110 and 2350.
July 5	(32)	Request (First) of Plaintiffs for Production of Documents by Communication Workers of America, Communication Workers of America District II, Communication Workers of America Committee on Political Education.
" 11	(33)	Motion of Defendant for Extension of Time to Answer Interrogatories, Produce Documents and Answer Request for Admission and Memorandum.
" 14	(34)	Opposition of Plaintiffs to Defendants Motion for extension of time to answer Interrogatories produce documents and Answer requests for Admissions.
" 18	(35)	Notice of Plaintiffs to take Depositions of Defendants.
" 15	(36)	Motion of Communication Workers of America to Dismiss, or alternatively for Stay pending Exhaustion of Internal Union Remedies, Points and Authorities, Affidavit and attachments.
" 28	(37)	Opposition of Defendants to Plaintiffs Motion for Extension of time to file Opposition to Defendants Motion to Dismiss or for Stay pending exhaustion of Internal Union Remedies.
Aug 8	(38)	Motion of Plaintiffs to Strike Opposition by Communication Workers of America to Plaintiffs Motion for extension of time.

DATE	NR.	PROCEEDINGS
1977		
Aug. 10	(39)	Opposition of Defendants to Plaintiffs Motion to Strike CWA Defendants opposition to Plaintiffs Motion for Extension of Time. (c/s)
Aug. 12	(40)	Motion and Order (Blair, J.) "DENYING" Plaintiffs Motion for extension of time to file opposition to Defendants Motion to Dismiss or for Stay. (c/m)
Aug. 15	(41)	Withdraw by Plaintiffs of Plaintiffs Motion to Strike Opposition by Communication Worker of America to Plaintiffs Motion for Extension of Time.
" 22	(42)	Motion of Plaintiff to Vacate Order of Court dated August 12, 1977 and for an Order Compelling Discovery, Request for Hearing and Exhibit A. (c/s)
" 25	(43)	Opposition of Plaintiffs to Motion of Communication Workers of America to Vacate Order of Court of August 12, 1977. (c/s)
" 26	(44)	Copy of Correspondence from Honorable C. Stanley, Blair to counsel of record "DENYING" Motion of Plaintiffs to vacate courts Order of August 12, 1977 and Staying Plaintiffs Discovery pending resolution of Motion to Dismiss.
" 29	(45)	Opposition of Plaintiffs to Motion of Communications Workers of America to Dismiss or For Stay, Request for Hearing and exhibits A-thru F. (c/s)
Sep. 2	(46)	Plaintiffs' Offer of Proof Pursuant to the Provisions of F. R. CIV. P. 43(c). (c/s)

DATE	NR.	PROCEEDINGS
1977		
Sep. 2	(47)	Reply of Communications Workers of America, Defendants to Plaintiffs' Opposition to Motion to Dismiss, or for Stay. (c/s)
" 7	(48)	Motion of Communications Workers of America, one of the Defendant, to Strike Plaintiff offer of proof. (c/s)
" "	(49)	Opposition of Plaintiffs to Motion of Communications Workers of America to Strike Plaintiff's offer of proof. (c/s)
" 12	(50)	Response of Plaintiffs to reply by Communications Workers of America to opposition by Plaintiffs to Motion of Defendants to Dismiss. (c/s)
" 30	(51)	Supplemental Opposition of Plaintiff to Motion of Communications Workers of America to Dismiss or for Stay. (c/s)
1978		
Jan 17	(52)	Supplemental Authorities of Communication Workers of America RE: Exhaustion of Internal Union Remedies and Attachment.
Apr. 5	(53)	Supplemental Offer of Proof of Plaintiff, Affidavit and exhibits A thru F.
" 26	(54)	Motion of Communication Workers of America and Local Union to strike Proffer and Points and Authorities. RE: Supplemental offer of Proof.
May 16	(55)	Letter (copy) dated March 16, 1978, from Hugh L. Reilly, Esquire, to Honorable C. Stanley Blair, RE: filing of two motions.
" "	(56)	Letter (copy) dated March 22, 1978, from Matthew A. Kane, Esquire, to Honorable C. Stanley Blair, RE: opposition to plain-

DATE	NR.	PROCEEDINGS
1978		
		tiffs request to the filling of (additional pleadings) two motions.
May 16	(57)	Letter (copy) dated March 27, 1978, from Honorable C. Stanley Blair, to counsel of record, denying request of plaintiffs to file additional motions.
Jul 20	(58)	Request (second) of Plaintiffs for Leave to file Motion for Preliminary Injunction and attachment. (c/s)
" 26	(59)	Opposition of Communications Workers of America to Second Request of Plaintiff for Leave to File Motions for Preliminary Injunction. (c/s)
" "	(60)	Letter (copy) from Honorable C. Stanley Blair, to counsel of record RE: Hearing on pending motions.
Aug. 17	—	Hearing on Motion of Defendant Communications Workers of America to Dismiss or Stay proceedings—Held Sub Curia.
Sep. 14	(61)	Supplemental Citation of Authority of Plaintiff and attachment.
Dec. 18	(62)	Motion of Plaintiffs for Preliminary Injunction and Proposed Order. (c/s)
" 26	(63)	Opposition of Communication Workers of America to Motion of Plaintiffs for Preliminary Injunction and attachment. (c/s)
" 29	(64)	Reply to Plaintiff to Opposition of Defendant to Motion of Plaintiff for Preliminary Injunction.

DATE	NR.	PROCEEDINGS
1979		
Jan. 12	(65)	Memorandum and Order (Blair, J.) "DENYING" Motion of Defendant to Dismiss or in the alternative to Stay of Proceedings as set forth and "DENYING" Motion of Plaintiffs for Summary Judgment as to Ct. 6 as therein more particularly set forth. (c/m 1-12-79ph)
" "	(66)	Letter (copy) from Honorable C. Stanley Blair to counsel of record RE: Scheduling.
" 25	—	Conference before Blair, J.
Feb 12	(67)	Motion of C.W.A. Defendants for reconsideration and modification of Courts' Order of January 12, 1979, or alternatively, for certification of interlocutory appeal and memorandum.
" 26	(68)	Opposition of Plaintiff to Motion of Communication Workers of America for Reconsideration and modification of Court's Order of January 12, 1979 or alternatively for Certification of Interlocutory appeal and exhibit A.
Mar. 5	(69)	Response of Defendant to opposition by Plaintiff to Motion of Defendant for REconsideration of Court's Order of January 12, 1979 or certification of Interlocutory appeal.
" 16	(70)	Memorandum and Order (Blair, J.) entering Judgment as set forth and "DENYING" Motions of Defendant to Dismiss, for reconsideration and for certification of an interlocutory appeal as therein more particlularly set forth. (c/, 3-19-79ph)
" 19	(71)	Judgment (Clerk) with approval of Blair, J. thereon that C.W.A. has collected, etc.

DATE	NR.	PROCEEDINGS
1979		
Micro Filmed Date Mar 22 1979		from Plaintiffs beyond and allocable to collective bargaining as set forth; that collection violates first Amendment rights of Plaintiffs; that Plaintiffs may agree upon percentage of budget to be disbursed; that matters can be referred to Master pursuant to Federal Rule Civil Procedure 53 as therein more particularly set forth. (c/m 3-19-79ph)
" 30	(72)	Order of attorney for Plaintiff dismissing with prejudice the case of Plaintiffs versus American Federation of Labor-Congress of Industrial Organizations; AFL-CIO Committee on Political Education; and the Maryland State AFL-CIO and Order (Northrop, CJ) "GRANTING" leave as prayed. (c/m 3-30-79ph)
May 3	(73)	Order (Blair, J.) appointing the Honorable Wilson K. Barnes as Special Master as therein set forth. (c/m 5-3-79ph)
Jun 19	(74)	Objection of Defendant Communication Workers to Interrogatories propounded by Plaintiffs.
" "	(75)	Motion of Defendant Communication Workers for Determination under Rule 54(b) or Alternatively for Certification Under 28 USC 1292(b) and Stay Pending Appeal and Memorandum.
" 26	(76)	Opposition of Plaintiffs to Motions of Defendant Communication Workers for Entry of Judgment pursuant to Rule 54(b) or for Certification pursuant to Title 28 1292(b). (c/s)

DATE	NR.	PROCEEDINGS
1979		
July 2	(77)	Reply of CWA Defendants to Opposition by Plaintiff to Motion of CWA Defendants for Determination under Rule 54(b). c/s).
" "	(78)	Interrogatories (First Amended) of Plaintiffs propounded to Communication Workers of America, Communications Workers of America District II, Communications Workers of America Committee on Political Education and Communications Workers of America Locals 2100, 2101, 2108, 2110 and 2350.
July 2	(79)	Request of (Second) of Plaintiffs for Production of Documents by Communication Workers of America, Communication Workers of America District II, and Communication Workers of America Committee on Political Education.
" 5	(80)	Response of Plaintiff to the Reply of CWA Defendants.
" 9	(81)	Response of Defendant Communications Workers of America to Second Request of Plaintiffs for Production of Documents.
" "	(82)	Memorandum and Order (Blair, J.) "DENYING" Motions of Defendants for a Determination under Rule 54(b) and Certification of Interlocutory Appeal. (c/m 7-9-79ph)
Jul 12	(83)	Motion of Plaintiffs to Compel Production of Documents by Defendants.
" "	—	Letter from Deputy Clerk to Attorney for Plaintiff RE: Local Rule 34.
Jul 17	(84)	Certificate of Plaintiffs Attorney RE: compliance with Local Rule 34.

DATE	NR.	PROCEEDINGS
1979		
July 24	(85)	Opposition of CWA Defendant to Motion of Plaintiff to compel production of documents and attachments. (c/s)
July 24	(86)	Motion of CWA, Defendant for Protective ORder and points and authorities in support thereof. (c/s)
July 27	(87)	Opposition of Plaintiffs to Motion of CWA for Protective Order and Exhibit A. (c/s)
July 27	(88)	Response of Plaintiffs to Opposition by Defendant CWA to Motion of Plaintiffs to Compel production of documents and Exhibits A.
Aug. 1	(89)	Answer of CWA, defendant to Amended Interrogatories propounded by Plaintiffs.
Aug. 6	(90)	Certificate of Attorney for Plaintiff RE: Local Rule 34.
Aug. 15	(91)	Reply of CWA Defendants to Opposition of Plaintiff to motion of CWA Defendants for Protective Order. (c/s)
" "	(92)	Opposition of CWA Defendants to Motion of Plaintiff to Compel Answers to First Amended Interrogatories and attachment.
Aug. 16	(93)	Letter from Wilson K. Barnes' (Special Master) to Honorable C. Stanley Blair RE: Scheduling, discovery and request for extension of time to file report. (letter dated 8/3/79)
Aug. 16	(94)	Motion of Wilson K. Barnes, Special Master, for Extension of time to file report. (dated 8/6/79)

DATE	NR.	PROCEEDINGS
1979		
Aug. 16	(95)	Order (dated 8/6/79) Blair, J) extending the time within which the Special Master shall have to file his report to and including January 31, 1980. (c/m 8/16/79 ph)
Aug. 16	(96)	Memorandum and Order (Blair, J) "GRANTING" and "DENYING" Motions pertaining to discovery as therein set forth. (c/m 8/16/79 ph)
Aug. 16	(97)	Order (Blair, J) "DENYING" Motion of CWA Defendants for Protective Order. (c/m 8/16/79 ph)
Aug. 16	(98)	Order (Blair, J) that Special Master shall decide all questions relating to discovery as therein set forth.
Sep. 11	(99)	Motion of Plaintiffs In Limine directed to Special Master RE: Instruction of Evidence or Testimony and Proposed Order.
Sep. 21	(100)	Answers of CWA Defendants to Interrogatories (First-Amended) propounded by Plaintiffs.
Oct. 3	(101)	Order (Wilson K. Barnes, Special Master) RE: Introduction of Testimony as Evidence that benefits parties and as to collective bargaining as therein more particularly set forth. (c/m)
Dec. 20	(102)	Motion and Order (Blair, J) Extending the time within which the Special Master shall file his report to and including April 28, 1980. (c/m 12/20/79 ph)
1980		
Jan. 16	(103)	Motion of Communication Workers of America to Stay Proceedings and attachment. (c/s)

DATE	NR.	PROCEEDINGS
1980		
Jan. 22	(104)	Opposition of Plaintiff to CWA's Motion (Second) to stay of proceedings.
Jan. 28	(105)	Memorandum and Order (Blair, J) "DENYING" Motion of Defendants to Stay. c/m 1/28/80 ph)
Feb. 15	(106)	Order (BARNES, SPECIAL MASTER) permitting C.W.A. defendants to file response to requests for admissions out of time.
" "	(107)	Response of C.W.A. Defendants to request (first) of Plaintiffs for Admissions.
Apr. 16	(108)	Motion and Order (Blair, J) Extending the time within which Special Master shall file report to and including July 11, 1980. c/m 4/16/80 ph)
May 15	(109)	Brief of Plaintiffs to the Special Master, and Exhibits A to I. (c/s) (Filed Separately)
" 27	(110)	Brief of Defendant, *COMMUNICATIONS WORKERS OF AMERICA* to the Special Master (Volume 1—The National Union), and Attachments 1 to 4. (1c/s) (Filed Separately)
" "	(111)	Brief of Defendant, *COMMUNICATIONS WORKERS OF AMERICA LOCALS 2100, 2101, 2108 and 2110* (Volume 2) and Attachment #5. (1c/s) (Filed Separately)
July 15	(112)	Motion of Special Master and Order (Miller, J.) extending the time within which said Master may file "Report of the Special Master" to and including August 25, 1980. (cm 7/17/80 v.s.)

DATE	NR.	PROCEEDINGS
1980		
July 15	(113)	Motion of Plaintiffs and Approval (Miller, J.) "DISMISSING" Claims as to Defendant, *SALLY B. DiMAURO*; and entering the claims as to Defendant, *HARRY E. BECK, JR.* as being "PAID AND SATISFIED". (c/m 7/17/80 v.s.)
Aug. 18	(114)	Report of Special Master, Wilson K. Barnes, Transcripts, Depositions, Briefs, Plaintiffs Exhibits, and Defendants Exhibits. (Note: Transcripts, Depositions, Briefs and Exhibits of Plaintiffs and Defendants are filed separately—41 envelopes)
"	" (115)	Order (Young, J.) extending the time for filing by the parties of exceptions, if any, to the Report of the Special Master, to and including 30 days after the date of the filing of the Report. (c/m 8/20/80 v.s.)
"	19 (117)	Letter mailed to Counsel pursuant to Rule 53 of the Federal Rules of Civil Procedure. (c/m 8/19/80 RL)
Sep. 10	(117)	Motion, Points and Authorities and Order (Miller, J.) extending the time within which Defendants may file objections to the Report of the Special Master, to and including October 17, 1980. (c/m 9/12/80 v.s.)
Oct. 17	(118)	Motion of defendants to recommit this matter to the Special Master, Memorandum, Exhibts A and B, and proposed order. (c/s).
"	" (119)	Appearance of Laurence Gold, Esquire as Counsel for *COMMUNICATIONS WORKERS OF AMERICA*. (c/s)

DATE	NR.	PROCEEDINGS
1980		
Oct. 22	(120)	Motion and Order (Miller, J.) extending the time within which Defendants may file objections to the Report of the Special Master pending disposition of Motion of Defendants filed October 17, 1980 to recommit this matter to the Special Master. (c/m 10/23/80 v.s.)
" 29	(121)	Opposition (Memorandum) of Plaintiffs to the Motion of Defendants to recommit this matter to the Special Master, and Exhibits A and B. (c/s)
" "	(122)	Request of Defendants for Oral Hearing on its Motion to recommit this matter to the Special Master and Proposed Order. (1c/s)
Nov. 3	(123)	Order (Miller, J.) directing Oral Argument be held on November 21, 1980 at 10:15 A.M. on the pending Motion to Recommit this Matter to the Special Master. (c/m 11/4/80 v.s.)
" 7	(124)	Response of Defendants to the Opposition of Plaintiffs to the Motion of Defendants to Recommit this matter to the Special Master. (1c/s)
" 21	(—)	Hearing on Motion of Defendants to Recommit this matter to the Special Master held before Miller, J.—"HELD SUB-CURIA".
" 28	(125)	Notice of Plaintiffs to take the Deposition of Glenn Watts and his designee(s).
Dec. 1	(126)	Request of Plaintiffs for Production of Documents as therein set forth. (c/s)

DATE	NR.	PROCEEDINGS
1980		
Dec. 19	(127)	Motion of Defendants, *COMMUNICATION WORKERS OF AMERICA, CWA DISTRICT II, and CWA LOCALS 2100, 2101, 1208 and 2110* for a Protective Order, Exhibits A to D, Memorandum, Appendix I, Local Rule 34 Notice and Proposed Order. (c/s)
" 29	(128)	Memorandum of Plaintiffs in Opposition to CWA Defendants' Motion for Protective Order (Paper #127). (c/s)
1981		
Jan. 5	(129)	Response of Defendants to First Requests to Produce following recommital to the Special Master. (c/s) (of Plaintiffs)
" 19	(130)	Memorandum and Order (Miller, J.) "GRANTING" Motion of Defendants to Recommit this matter to Special Master (Paper No. 118); referring action back to the Special Master, Wilson K. Barnes as therein set forth; directing that the Special Master file a Supplemental Report within 90 days as therein set forth; and notifying parties as to an equitable allocation of Costs of the re-reference as therein set forth. (c/m1/21/81 v.s.) (cc to Spc. Master)
" "	(131)	Transcript of Proceedings before the Court Miller, J. on November 21, 1980.
" 30	(132)	Motion of Plaintiffs to the Special Master for a Discovery Conference. (c/s)
" "	(133)	Interrogatories (32) of Plaintiffs propounded to Defendants. (c/s)

DATE	NR.	PROCEEDINGS
1981		
Feb. 12	(134)	Motion and Order (Miller J.) extending the time within which Wilson K. Barnes, Special Master may file the Supplemental Report of the Special Master to and including June 15, 1981. (c/m(2/12/81)
Mar. 3	(135)	Attorney's Certificate under Local Rule 34.
" "	(136)	Motion of Plaintiffs to Compel Answers to their First Set of Interrogatories following recommital to the Special Master and Exhibit A. (c/s)
" 18	(137)	Response of Defendants to Motion of Plaintiffs to Compel Answers to their First Set of Interrogatories (Paper 136), and Appendix A (Affidavit). (c/s)
" 23	(138)	Reply of Plaintiffs to the Response of Defendants to the Motion of said Plaintiffs to Compel Answers to their First Set of Interrogatories, and Exhibit A. (c/s)
" 27	(—)	Briefs of Plaintiffs and Defendants (Envelope #10 of 41, Paper No. 114) forwarded to Special Master, Wilson K. Barnes per instructions from Paul Sclitz, Clerk of The Court.
" 30	(139)	Supplemental Brief of Plaintiffs to the Special Master concerning the Collective Bargaining Costs ratio proven by the *CWA LOCAL UNION* Defendants. (c/s)
" 31	(140)	Memorandum of Defendant, *COMMUNICATION WORKERS OF AMERICA LOCALS 2100, 2101,* 2108 and 2110, to the Special Master concerning Expenditures of said Defendants, and Appendix A, B-1, B-2, B-3, B-4, and B-5. (c/s)

DATE	NR.	PROCEEDINGS
1981		
Apr. 13	(141)	Memorandum and Order (Wilson K. Barnes, Special Master) dated April 10, 1981 "GRANTING" in Part and "DENYING" in Part the Motion of Plaintiffs to Compel Defendants to Answer Certain Interrogatories as therein set forth and Exhibits A, A1, A2, A3, B, B1 and B2. (c/m by Special Master 4/10/81 v.s.)
"	" (142)	Reply of Plaintiffs to the Memorandum to Defendant, *COMMUNICATIONS WORKERS OF AMERICA LOCALS 2100, 2101, 2108, 2110* to the Special Master concerning Expenditures of said Defendants. (c/s)
Apr. 14	(143)	Response of Defendants, *COMMUNICATIONS WORKERS OF AMERICA, LOCALS 2100, 2101, 2108, and 2110* to the Supplemental Brief of Plaintiffs to the Special Master concerning said Defendants. (c/s)
" 20	(144)	Supplemental Answers of Defendant, *COMMUNICATIONS WORKERS OF AMERICA, COMMUNICATIONS WORKERS OF AMERICA DISTRICT 2, and COMMUNICATIONS WORKERS OF AMERICA COMMITTEE ON POLITICAL EDUCATION* to the First Set of Interrogatories propounded by Plaintiff. (c/s)
" 20	(145)	Motion of Plaintiffs to disregard immaterial and impertinent matter from the Response of Defendants, *CWA LOCAL UNION* to the Supplemental Brief of Plaintiffs to the Special Master (Paper No. 143). (c/s)

DATE	NR.	PROCEEDINGS
1981		
Apr. 20	(146)	Motion of Plaintiffs pursuant to F.R.Civ. P. 26(b) (4) (A) (i) and 26 (c) (2) limiting the scope of discovery of expert witnesses and concerning the terms and conditions of discovery. (c/s)
" 29	(147)	Opposition of Defendants to the Motion of Plaintiffs to Strike a portion of their Memorandum in response to the Supplemental Brief of Plaintiffs (Paper Nos. 143 & 145.) (See Paper No. 151)
" "	(148)	Response of Defendants to the Motion of Plaintiffs pursuant to Rule 26 (Paper No. 146). (See Paper No. 150)
May *	(149)	Memorandum of Plaintiffs on CWA Defendants' Motion or Request for a Protective Order. (c/s)
" 7	(150)	Reply of Plaintiffs to the Response of Defendants to the Motion of Plaintiffs pursuant to Rule 26 (Paper No. 148). (c/s)
" "	(151)	Response of Plaintiffs to the Reply (Opposition) of Defendants to the Motion of Plaintiffs to Strike (Paper No. 147). (c/s)
" 11	(152)	Response of Defendants, *CWA* to the Opposition of Plaintiffs to the Proposed Order Controlling Discovery, Attachments A to I, and Affidavit. (c/s)
" "	(153)	Deposition of Dina G. Beaumont taken on April 20, 1981 on behalf of Plaintiffs. (Filed Separately)
" "	(154)	Deposition of James Wellington Gee taken on April 20, 1981 on behalf of Plaintiffs. (Filed Separately)

DATE	NR.	PROCEEDINGS
1981		
May 11	(155)	Deposition of George R. Strick taken on April 20, 1981 on behalf of Plaintiffs. (Filed Separately)
" 15	(156)	Reply of Plaintiffs to the Response of Defendants, *CWA* to the Opposition of Plaintiffs to the Proposed Order Controlling Discovery and Proposed Order to the Special Master. (c/s)
" 20	(157)	Motion and Order (Miller, J.) extending the time within which Wilson K. Barnes, Special Master, may file a Supplemental Report, to and including August 15, 1981. (cm/m 5/21/81 v.s.)
" 27	(158)	Order (Wilson K. Barnes, Special Master), dated May 26, 1981, Respecting Discovery as therein set forth. (c/s)
June 8	(159)	Deposition of Glenn Ellis Watts taken on May 15, 1981 on behalf of Plaintiffs. (No Exhibits received). (Filed Separately)
" 16	(160)	Deposition of Harvey J. Nuland taken on May 28, 1981 on behalf of Plaintiffs. (Filed Separately)
" "	(161)	Deposition of Harvey Nuland resumed on May 29, 1981 on behalf of Plaintiffs. (Filed Separately)
" "	(162)	Deposition of Irving B. Ross taken on June 1, 1981 on behalf of Defendants, *CWA*. (Filed Separately)
" "	(163)	Deposition of Patsy L. Fryman taken on June 2, 1981 on behalf of Plaintiffs. (Filed Separately)
" "	(164)	Deposition of James William Webb taken on June 2, 1981 on behalf of Plaintiffs. (Filed Separately)

DATE	NR.	PROCEEDINGS
1981		
June 16	(165)	Deposition of Edward C. Bryant taken on June 3, 1981 on behalf of Plaintiffs. (Filed Separately)
" "	(166)	Deposition of James Gee taken on June 4, 1981 on behalf of Plaintiffs. (Filed Separately)
" "	(167)	Deposition of Charles Robert Beans taken on June 4, 1981 on behalf of Plaintiffs. (Filed Separately)
" "	(168)	Deposition of Bruce W. Hamilton taken on June 9, 1981 on behalf of Defendants, *CWA*. (Filed Separately)
" 22	(169)	Deposition of Charles R. Mann taken on June 11, 1981 on behalf of Defendants, *CWA*. (Filed Separately)
" "	(170)	Deposition of David Hawkins taken on June 12, 1981 on behalf of Defendants, *CWA*. (Filed Separately)
July 23	(171)	Motion of Special Master and Order (Miller, J.) extending the time within which the Special Master may file a Supplemental Report, to and including September 15, 1981. (c/m 7/24/81 v.s.)
" 31	(172)	Motion *of Plaintiffs NE RECIPIATUR* or to Strike Brief and Appendices C, D, & E of Defendants. (c/s) (Copy)
Aug. 3	(173)	Motion of Defendants for Protective Order Sealing certain Exhibits of Plaintiff, Memorandum, Appendix I, and Attachments. (1 c/s)
" "	(174)	Supplemental Hearing Brief of Defendants, Appendix A, B, C, D, and E. (Filed Separately) (1 c/s)

DATE	NR.	PROCEEDINGS
1981		
Aug. 10	(175)	Opposition of Defendants to the Motion of Plaintiffs *NE RECIPLATUR* or to Strike the Brief and Appendices C, D, and E, of Defendants. (c/s)
Aug. 11	(176)	Reply of Plaintiffs to the Opposition of Defendants to the Motion of Plaintiffs *NE RECIPIATUR* or to Strike the Brief and Appendices C, D, and E, of Defendants (c/s)
" 14	(177)	Memorandum and Order of the *SPECIAL MASTER* in regard to the Motion of Plaintiffs *NE RECIPIATUR* or to Strike Defendants' Brief and Appendices, C, D, and E, pursuant to Memorandum and Order dated January 19, 1981 (Paper No. 130). (c/s) (copies were mailed to counsel by Special Master)
" 20	(178)	Opposition of Plaintiffs to the Motion of Defendants for a Protective Order that certain Exhibits of Plaintiffs be sealed, and Brief (Phase II) of Plaintiffs to the Special Master and Appendices I to XVI. (c/s) (Filed Separately)
Sept. 11	(179)	Order (Special Master Barnes) "DENYING" Motion of Defendants for Protective Order that certain Plaintiff exhibits be sealed. (c/m by Special Master) (c/s)
" 14	(180)	Reply Brief (Supplemental Hearing) of Defendants. (c/s)
" 14	(181)	Analysis of Appendices by Defendant of Brief of Plaintiff, Appendix I, VI, XI, XVI, and XXI. (c/s)
" 14	(182)	Supplemental Report of (Special Master Barnes) and Attachments. (c/s) Tran-

DATE	NR.	PROCEEDINGS
1981		
		scripts, Briefs, Memoranda, Defendant Exhibits, Plaintiff Exhibits and Daily Activities Log (2 vol.) Rec'd 9/14/81, Filed Separately.
Sept. 23	(183)	Order (Miller J.) dated September 22, 1981 extending time within which parties may file exceptions to Supplemental Report of Special Master Barnes to and including thirty (30) days after the filing of said report. (c/m by Chambers)
Oct. 14	(184)	Application of Plaintiffs for Action upon and their Objections in part to the Report of Special Master dated September 14, 1981 and Brief in support thereof. (c/s)
" 14	(185)	Objections of Defendant *COMMUNICATIONS WORKERS OF AMERICA* to the report of the Special Master. (c/s)
" 14	(186)	Objections of Defendants *COMMUNICATIONS WORKERS OF AMERICA LOCALS 2100, 2101, 2108, and 2110* to the Report of Special Master. (c/s)
" 14	(187)	Motion of Defendants *COMMUNICATION WORKERS OF AMERICA, AFL-CIO,* and *CWA LOCALS 2100, 2101, 2108, and 2110* to establish a deadline for Motion and Memorandum on the Supplemental Report of the Spceial Master, Memorandum and Proposed Order. (c/s)
" 19	(188)	Opposition of Plaintiff to Motion of Defendant to establish a deadline for Motions and Memoranda. (c/s)
" 26	(189)	Motion of Defendants *COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,*

DATE	NR.	PROCEEDINGS
1981		
		and *CWA LOCALS 2100, 2101, 2108, and 2110* for extention of time in which to file response to Motion of Plaintiff that Court take action on Supplemental Report of Special Master Barnes to and including November 13, 1981, Memorandum and Proposed Order. (c/s)
Oct. 28	(190)	Motion of Defendants the COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO (C.W.A.) and CWA DISTRICT 2 for a Protective Order, Memorandum Appendix I, Attachment A thru I, Affidavit (Copy), and Proposed Order. (c/s)
Nov. 3	(191)	Notice of Defendants to take the Deposition of Louis B. Knecht and his designee.
" 3	(192)	Motion of Defendant's to Quash Notice of Plaintiffs to take Deposition of Louis B. Knecht and his designee, Exhibit a & b, Memorandum, Compliance with Local Rule 34 and Proposed Order. (c/s)
" 9	(193)	Motion of Plaintiffs for extention of time within which to respond to Motion of Defendants for enlargement of time. (c/s)
" 9	(194)	Memorandum of Plaintiffs in Opposition to Motion of Defendants to Quash Notice of Depositions of Plaintiff. (c/s)
" 13	(195)	Motion and Order (Miller, J) dated November 13, 1981 extending time within which Plaintiffs may file a response to Motion of Defendants for Protective Order to and including November 23, 1981. (c/m) (11/13/81) (hba)
" 13	(196)	Motion of Defendant *LOCALS 2100, 2101, 2108, and 2110* for Action on the Supplemental Report of the Special Master, Memorandum, and Appendix. (c/s)

DATE	NR.	PROCEEDINGS
1981		
Nov. 13	(197)	Motion of Defendant *COMMUNICATIONS WORKERS OF AMERICA, (CWA), AFL-CIO* for action on Supplemental Report of the Special Master, Memorandum, Appendices and Proposed Injunctive Language, and Appendix A and B. (c/s)
" 23	(198)	Memorandum of Plaintiff in Opposition to Motion of Defendants for a Protective Order. (c/s)
" 24	(199)	Motion of Plaintiffs for Extension of Time within which to file response to Memoranda of Defendant COMMUNICATION WORKERS OF AMERICA, (CWA). (c/s)
Dec. 2	(200)	Response of Defendants to Motion of Plaintiffs for Extension of Time. (c/s)
" "	(201)	Errata I Defendants COMMUNICATION WORKERS OF AMERICA, (CWA) AFL-CIO Memorandum in support of its Motion for Action on the Supplemental Report of the Special Master and Attachments. (c/s)
" 4	(202)	Reply of Defendants to Response of Plaintiff to Motion of Defendants for Protection. (c/s)
1982		
Jan. 4	(203)	Response of Plaintiffs to Memorandum of Defendants (paper 201), in support of said Defendants Motion for Action on the Supplemental Report of the Special Master and Exhibits A and B. (c/s) (Filed Separately)
Mar. 5	(204)	Motion of Defendants for leave to file Motion for Judgment, Memorandum, and Proposed Motion and Memorandum. (c/s)

DATE	NR.	PROCEEDINGS
1982		
Mar. 22	(205)	Opposition of Plaintiffs' to Motion of Defendant *COMMUNICATIONS WORKERS OF AMERICA* for leave to file Motion for Judgment and Exhibit A. (c/s)
" 29	(206)	Reply of Defendant *COMMUNICATIONS WORKERS OF AMERICA* to Opposition to Plaintiffs to Request of said Defendant for leave to file Motion. (c/s)
Apr. 19	(207)	Memorandum (Supplemental) of Defendant *COMMUNICATIONS WORKERS OF AMERICA CWA COPE, CWA DISTRICT 2, CWA LOCAL 2100, 2101, 1208, 2110 and 2350* in support of it's Motion for leave to file Motion for Judgment and Attachment. (c/s)
" 26	(208)	Reply of Plaintiffs to Memorandum (Supplemental) of Defendants *COMMUNICATION WORKERS OF AMERICA, CWA COPE, CWA DISTRICT 2, CWA LOCALS 2100, 2101, 2108, 2110* and *2350* in support of its Motion for Leave to File Motion for Judgment. (c/s)
July 8	(209)	Memorandum (Second) (Supplemental) of Defendants in support of Motion of Defendants for leave to file a Motion for Judgment.
July 23	(210)	Reply of Plaintiffs to Memorandum (Supplemental) (Second) of Defendants *COMMUNICATION WORKERS OF AMERICA, CWA COPE, CWA DISTRICT 2, CWA LOCALS 2100, 2101, 2108, 2110* and *2350* in support of its Motion for Leave to File Motion for Judgment. (3 c/s)

DATE	NR.	PROCEEDINGS
1982		
Sept. 23	(211)	Notice of Defendants of Recent Decision with respect to action on Supplemental Report of the Special Master and Attachments. (c/s)
" 29	(212)	Request of Plaintiff that Court establish and Order a briefing Schedule. (1 c/s)
Oct. 1	(213)	Notice of Plaintiffs of recent opinion of the U.S. District Court for the District of New Jersey in consolidated cases civil actions Nos. 82-1118 and 82-1119 decided September 28, 1982, as therein set forth, and Attachment. (3 c/s)
" 14	(214)	Notice of Defendant *COMMUNICATIONS WORKERS OF AMERICA* of Action taken pursuant to CWA Policy on Rebates, and Exhibits A.B.C, and D. (c/s) (Filed Separately)
" 28	(215)	Motion of Plaintiff *Ne Recipiatur* or to Strike the Notice of Defendant *CWA* action taken pursuant to *CWA* Policy on Rebates. (c/s)
Nov. 8	(216)	Opposition of Defendant *CWA* to Motion of Plaintiff *Ne Recipiatur* to Strike the Notice of said Defendant's action taken pursuant to CWA Policy Rebates. (c/s)
" 15	(217)	Reply of Plaintiff to Opposition of Defendant CWA to Motion of Plaintiff *Ne Recipiatur* to Strike the Notice of said Defendant's action taken pursuant to CWA Policy Rebates.
1983		
Jan. 5	(218)	Appearance of Milton L. Chappell, Esq. and Joseph J. Hahn, Esq. as additional counsel for Plaintiffs. (3 c/s)

DATE	NR.	PROCEEDINGS
1983		
Jan. 31	(219)	Appearance of James B. Coppess as counsel for Defendants.
Mar. 14	(220)	Memorandum and Order (Miller, J.) dated March 4, 1983 Directing that Plaintiffs shall submit Affidavits setting forth agency fees paid from August 18, 1980 to March 31, 1983 within Twenty (20) days of the date of this Order and advise the Court of the Total Compensation paid or owed the Special Master by Plaintiffs within Twenty (20) days of the date of this Order. (c/m by chambers.)
Mar. 18	(221)	Motion and Order (Miller,J) dated 3-7-8 "GRANTING" Hugh L. Reilly, Esq. leave to withdraw as counsel for Plaintiff. (c/m 3-8-83 hm)
" 23	(222)	Response of Plaintiffs to Order of Court dated March 4, 1983, Affidavits (13), Attachments, and Proposed Order. (c/s)
Apr. 4	(223)	Response (Memorandum) of Defendants to Motion of Plaintiffs to Correct and Proposed Order for Injunction Relief of Plaintiffs and Plaintiff's Submission dated March 23, 1983 and Proposed Order. (1 c/s) (Attachment A rec'd 4/7/83)
" 6	(224)	Affidavit of Doris R. Ambrose. (c/s)
" 15	(225)	Report of Defendant UNIONS on Agency Fee Receipts from Plaintiffs in Compliance with Memorandum and Order dated March 4, 1983 and Attachments (1 c/s)
Aug. 16	(226)	Stipulation of Fact and "APPROVAL" (Miller, J.) dated August 8, 1983. (c/m by Chambers)

DATE	NR.	PROCEEDINGS
1983		
Aug. 16	(227)	Memorandum (Miller, J.) dated August 9, 1983. (c/m by Chambers)
"	" (228)	Judgment (Miller, J.) dated August 9, 1983 (1) entering judgment in favor of Plaintiffs against CWA Defendants in total amount of Nine Thousand, Three Hundred Ninety One Dollars ($9,391.00) with amounts awarded to individual Plaintiffs as therein set forth; (2) entering judgment for the Plaintiffs against Defendants in the amount of $37,279.64 as reimbursement for amount paid by Plaintiffs as compensation to the Special Master. (3) Defendants to pay costs and (4) permanently "ENJOINING" COMMUNICATIONS WORKERS OF AMERICA Defendants with conditions as therein set forth. (c/m by Chambers)
MicroFilmed Date Aug. 24, 1983		
Aug. 18	(229)	Motion of Defendants for Stay pending appeal and Proposed Order. (c/s)
"	" (230)	Notice of Appeal of Defendants (Filing fee paid) (c/m 8/31/83) (Transcript purchase order form mailed to counsel 8/31/83)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Docket No. 83-1955 (L) and XAP 83-1956

HARRY E. BECK, JR.; DORIS R. AMBROSE; JACQUELINE S. BRANDON; MARY ANNA COX; SALLY B. DiMAURO; RUE T.F. DOWNEY; KATHLEEN A. HEIL; JOHN J. HURLEY; HARRIETT LIPSCHULTZ; CLAY B. LUTZ; BARBARA McGAUGHEY; ROLAND R. MERKLE; ETHEL T. MERRYMAN; DORIS J. MORROW; MARION F. NORTHROP; FRANCES M. PHILIPS; VIVIAN REEDY; BARBARA A. RUSSELL; LOIS A. STALLINGS; HARRY B. SWARTZ, SR.;

Appellees,

vs.

COMMUNICATIONS WORKERS OF AMERICA (C.W.A.), AN UNINCORPORATED LABOR ORGANIZATION; C.W.A. COMMITTEE ON POLITICAL EDUCATION (C.W.A. COPE); C.W.A. DISTRICT II; LOCAL 2100 OF C.W.A.; LOCAL 2101 OF C.W.A.; LOCAL 2108 OF C.W.A.; LOCAL 2110 OF C.W.A.;

Appellants,

and

LOCAL 2350 OF C.W.A.; AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL-CIO), A FEDERATION OF NATIONAL AND INTERNATIONAL LABOR ORGANIZATIONS; AFL-CIO COMMITTEE ON POLITICAL EDUCATION; MARYLAND STATE AFL-CIO; AMERICAN TELEPHONE & TELEGRAPH, A CORPORATION; C & P TELEPHONE COMPANY OF MARYLAND, A CORPORATION;

Defendants.

DOCKET ENTRIES

BRIEF AND APPENDIX

* Comm. Workers of America will file 1st brief.

5-15-84	APPX 6 filed. PM-wc
7-6-84	6 filed. G/mb (Supplemental Appendix)
5-16-84	A/P BRF 12 filed. PM-sc
	/3-11-86 A's supplemental brief 12 filed. HD-wc
6-29-84	E/R BRF 12 filed. G/mb /3-11-86 E/A supp. brief filed. HD-sc.
8-1-84	12 filed. PM/mb (A/Cross-E)
10-16-84	REPLY 12 copies of A's Reply to E's Suppl. Brief filed. G-sc
8-31-84	12 copies of E's/Cross-A filed. G-sc
10-16-84	OTHER 12 copies of E's Suppl. Brief filed. G-sc
3-5-86	extra copies of briefs and appendix filed. sc
11/1/84	E's 28(j) submitted to panel in court. dad
4/22/85	a's 28(j) filed. Transmitted to panel. dhb
7/1/85	28(j) filed. Transmitted to panel. dhb
7/21/86	28(j) filed. Transmitted to panel. ses

SUMMARY OF EVENTS

4-8-86	En Banc wc
11/1/84	ARGUMENT (dad) Rehearing
	HLW (DSR) PANEL RFC En Banc
10/24/85	OPINION 9/12/86
10/24/85	JUDGMENT 9/12/86 (see below)
	DISPOSITION Aff/pt rev/pt & Rem P sjb

PETITION

*HLW dissenting 11/14/85 As/Es (nac)

10/3/86 MANDATE ISSUED

10/3/86 mb RECORD RETURNED

10/17/86 CERTIORARI 86-637

☐ Denied ☒ Grante ☒ En Banc 1/23/86 (jm)

DATE	FILINGS-PROCEEDINGS
10-20-83	Case docketed. Awaiting ROA. mh
11-03-83	DISCLOSURE STMNT. A, N, filed. mh
11-07-83	DISCLOSURE STMNT. A, N, filed. mh
03-23-84	XAP BRIEFING ORDER, A due 05-02-84, tentative calendar Summer Sessions 1984, filed. mh
03-23-84	ORDER consolidating cases 83-1955(L) and 83-1956 for briefing and oral argument, filed. mh
04-09-84	UNOPPOSED MOTION (D-30) for extension of time in which to file brief of As, filed BMN:zyj (Requested 6/1/84)
04-13-84	ORDER denying As motion for an extension of time to 6/1/84 to file their opening brief and extending As time to file brief to 5/16/84, filed BMN:zyj Copy to Coppess; Gold; Leibig; Hahn
5/24/84	UNOPPOSED MOTION (E-116) of Es/As for page enlargement to opening brief, filed (SAR: jm)
5/24/84	UNOPPOSED MOTION (E-117) of Es/As for extension of time to file brief, filed (SAR:jm)
5/31/84	ORDER granting motion of Es/As for page enlargement to 60 pages, filed (SAR:jm) Copy to Hahn; Leibig; Gold; Coppess
5/31/84	ORDER extending the time to file Es/As opening brief to 6/30/84, filed (SAR:jm) Copy to Hahn; Leibig; Gold; Coppess
7/3/84	MOTION of Es/Cross-As (G-20) for leave to file supp. apx, file MOTION GRANTED on 7/6/84. (BMM:jd) Copy to counsel.
8/6/84	UNOPPOSED MOTION (H-17) of Es/Cross-As for an extension of time to 8/31/84 to file reply brf, filed. BMM:gac MOTION GRANTED.

DATE	FILINGS-PROCEEDINGS
9/17/84	MOTION (I-78) of Es for leave to file a supplemental brief, filed (BMM:jm)
9/25/84	RESPONSE of As to motion I-78, filed. jd
9/25/84	MOTION I-78 and response transmitted to HLW/DSR/RFC. (BMM:jd)
9/28/84	RESPONSE of A to Es' motion (I-78) filed. Transmitted to HLW/DSR/RFC on 10/1/84. (BMM:jd)
10/16/84	ORDER granting motion for Es to file a supplemental brief and As for leave to file a reply supplemental brief, filed BMM:zy Copy to Coppess; Gold, Leibig, Hahn
11/6/85	MOTION (k27) of As/cross-Es Communications Workers of America et al for extension of time in which to file a petition for rehearing, filed (SES:nac)
11/7/85	ORDER granting As/cross-Es Communications Workers of America, et al, an extension to 11/14/85 in which to file a pet. for reh., filed (SES:nac) Copy to Coppess; Gold; Vieira; Leibig; Hahn
11/14/85	PETITION FOR REHEARING (K-78) of appellants/cross-appellees, filed (SES:nac)
11/15/85	Transmitted appellants/cross-appellees' position for rehearing to HLW; DSR; RFC with copy to all active circuit judges. (SES:nac)
11-27-85	REPLY (K-78) to the petition for rehearing by Es/As, filed (SEC:cw) Transmitted to HLW, DSR, RFC with copies to all active circuit judges.
1/23/86	ORDER granting As/Es petition for rehearing and suggestion for rehearing in banc, filed (SES:jm) Copy to Vieira; Leibig; Gold; Hahn; Coppess

DATE	FILINGS-PROCEEDINGS
2/4/86	LETTER from As/Es requesting leave to file supplemental briefs, filed (SAR:jm) Transmitted to HLW, DSR, HEW, KKH, JDP, FDM, JMS, RFC, JHW on 2/5/86
2/11/86	Letter to counsel stating that the Court will re-receive supplemental brief from As/Es; opposing counsel have similar right; supplemental briefs due 3/11/86 (SES:jm)
7/21/86	28(j) material submitted to en banc court. ses
7/24/87	Letter from Supreme Court, requesting that record on appeal be transmitted to Supreme Court Clerk's Office received. mb
7/27/87	Record requested from the Clerk of the U.S. District Court, DMD-Baltimore. mb

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. B 76-839

(Title Omitted in Printing)

COMPLAINT

(For declaratory judgment, injunction, compensatory and punitive damages, and attorneys' fees.)

JURISDICTION

(1) This Court has jurisdiction over the claims for relief stated in various Counts by virtue of:

Pendent jurisdiction, as to Count I, in that the claims of breach of fiduciary duty have a common nexus with the claims in Counts II and IV;

Title 28 U.S.C. § 1331, as to Counts II-V, in that matters in controversy arise under the laws of the United States, to wit: Title 29 U.S.C. § 141 *et seq.*, Title 18 U.S.C. § 610, Title 42 U.S.C. §§ 1985(3) and 1986, and exceed the value of $10,000 to each Plaintiff, exclusive of interest and costs;

Title 28 U.S.C. § 1337, as to Counts II-V, in that they derive from an Act of Congress regulating commerce, to wit: Title 29 U.S.C. § 141 *et seq.*;

Title 28 U.S.C. § 1343, as to Count V, as they are claims to recover damages and obtain equitable relief under an Act of Congress providing for the protection of civil rights, to wit: Title 42 U.S.C. §§ 1985 and 1986;

Title 29 U.S.C. § 185, as to Counts II and IV, as they make claims for breach of contract and violation of fiduciary duty, under standards gauged by Title 29 U.S.C. §§ 158(a)(3) and 159; and

Title 29 U.S.C. § 412, as to Count VI, as Plaintiffs are persons whose rights are being, or may be, infringed by the Defendant labor organizations under color of Title 29 U.S.C. § 141(a)(4).

PARTIES

(2) Plaintiffs are citizens of the United States, residents of the State of Maryland who work in that State, employees of American Telephone & Telegraph (Harry E. Beck, Jr.) or one of the Chesapeake & Potomac Telephone Companies (the remaining Plaintiffs) at various locations within the State, subject to collective bargaining arrangements (one of which is described in ¶¶ 11-12) between their employer and a labor organization, and are not, themselves, members of any of the Defendant labor organizations.

(3) Defendants American Telephone & Telegraph Company and Chesapeake & Potomac Telephone Companies (AT&T and C&P, respectively, or Companies) are each bodies corporate, organized under the laws of or with agents conducting business within the State of Maryland, part of the Bell Telephone System, and are operating in interstate commerce. They are the employers of the Plaintiffs, as designated in ¶ 2, and have entered into collective bargaining arrangements with a labor organization to which Plaintiffs are subject.

(4) Defendant Communications Workers of America (C.W.A.) is a labor organization, as defined in applicable statutes, which is operating in interstate commerce. It has collective bargaining arrangements with AT&T and C&P to which Plaintiffs are subject and by which it is Plaintiffs' exclusive representative under Title 29 U.S.C.

§ 159. It is affiliated with the American Federation of Labor-Congress of Industrial Organizations, described in ¶ 7, and is a parent to the subordinate Committee, District II, and Local Unions, described respectively in ¶¶ 9, 6, and 5, all of which are Defendants herein.

(5) Defendant Local Unions, 2100, 2101, 2108, 2110, and 2350 (Local Unions), are separately organized but subordinate units of C.W.A. They have jurisdiction in Maryland which is granted by C.W.A. and they exist pursuant to Charters which are extended by the C.W.A. Executive Board. They are labor organizations as defined in applicable statutes, which are operating in interstate commerce.

(6) Defendant Communications Workers of America, District II (District II), is a separately organized but subordinate unit of C.W.A. responsible for activities of both C.W.A. and Local Unions in various states, including Maryland. It is a labor organization, as defined in applicable statutes, and is operating in interstate commerce.

(7) Defendant American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) is a federation of national and international unions, one of which is C.W.A. It is a labor organization, as defined in applicable statutes, is operating in interstate commerce and has separately organized but subordinate units including the Committee on Political Education (AFL-CIO COPE) and the Maryland State AFL-CIO, respectively described in ¶¶ 9 and 8.

(8) Defendant Maryland State AFL-CIO (MD State AFL-CIO) is a separately organized but subordinate organization composed of international, national, and local unions, including C.W.A. and its Local Unions, within the geographical limits of the State of Maryland, which are affiliated with the AFL-CIO. It is a labor organization, as defined in applicable statutes, and is operating in interstate commerce.

(9) Defendants C.W.A. Committee on Political Education (C.W.A. COPE) and AFL-CIO Committee on Political Education (AFL-CIO COPE) are separately organized subsidiaries of their respective parent organizations. The purpose is to engage in illegitimate activities, as defined in ¶ 16, insofar as they utilize monies taken from Plaintiffs as a condition of their employment to engage in those activities.

(10) Defendants C.W.A., C.W.A. COPE, District II, Local Unions, AFL-CIO, AFL-CIO COPE, MD State AFL-CIO, as well as their respective subordinate departments, committees, and units, act as agents for one another by virtue of commitments in their Charters and Constitutions, agreements among them, and the fact that they collect, transfer, and expend Plaintiffs' monies taken as agency fees, directly or indirectly, to or on behalf of one another. They are labor organizations within the meaning of Title 29 U.S.C. § 141 *et seq.* and Title 18 U.S.C. § 610, and exist, in part, for dealing with employers over the wages, hours, and terms and conditions of Plaintiffs' employment. They are collectively referred to herein as "Unions".

FACTS

(11) The Companies and C.W.A. have negotiated successive collective bargaining arrangements between themselves which have purported and now claim to govern the terms and conditions of Plaintiffs' employment. These terms and conditions include Plaintiffs' wages, hours, and working conditions, as well as the requirement that they pay to C.W.A. the monetary equivalent of the amount C.W.A. charges its members as dues. These dues-equivalent charges are called "agency fees". In these arrangements, C.W.A. is recognized by AT&T and C&P, under color of the provisions of Title 29 U.S.C. § 159, as the exclusive representative of all AT&T and C&P employees in bargaining units which include the Plaintiffs.

(12) The current arrangements, including this recognition, are codified in writing. Pertinent portions of them, pertaining to the agency shop, are annexed hereto as Exhibit A (Article 4, C&P, and Article 15, AT&T). These have been in effect since January 1, 1976, and classify bargaining unit employees into two groups: (a) employees who are full Union members; and (b) employees, such as Plaintiffs, who are forced to "pay or tender to C.W.A. amounts equal to the periodic dues equal to [union] members" as a condition of employment and who are not, themselves, Union members.

(13) In the Summer of 1974, C.W.A., as the exclusive representative, with the participation of the other Unions, engaged in a strike against AT&T and C&P. That strike was settled between AT&T, C&P and C.W.A. without the prior approval or subsequent ratification of the terms of the settlement by the Plaintiffs. The settlement resulted in a provision for the termination of all employees who decline to pay dues or agency fees to C.W.A., described in ¶¶ 12 and 14.

(14) Plaintiffs have been told, by authorized representatives of AT&T, C&P and the Unions, that the requirement that they pay agency fees as a condition of employment means that should they fail to make such payments, C.W.A. would request termination of their employment and AT&T or C&P would fire the employees who decline to make them.

(15) This is true despite Plaintiffs' preference to represent themselves in collective bargaining and grievance handling with AT&T and C&P rather than have C.W.A. act for them. They have protested to AT&T and/or C&P and C.W.A. the negotiation, execution, administration, and enforcement of this arrangement, by which C.W.A. became their exclusive representative, and which coerces payments from them to C.W.A. These protests have been accomplished by each Plaintiff having sent to AT&T or

C&P, as applicable, and to the Unions, letters, specimens of which are labeled Exhibits B, and C to this Complaint.

(16) With monies coerced from the Plaintiffs through agency fees, C.W.A. and the other Unions, since January 1, 1976, have continued many and varied activities undertaken for costs, obligations, and expenditures in areas which include, but are not limited to:

(A) Agitation, propaganda, and lobbying with reference to:

[1] legislative programs before Congress, state legislatures and various committees thereof;

[2] state and federal agency, and executive actions, decisions, regulations, policies, and appointments; and

[3] economic, social, political, and ideological causes, philosophies, and credos favored by the Unions;

(B) Direct or indirect payments, loans, advances, deposits, gifts of money, contributions, or "in kind" services or things of value, to or on behalf of:

[1] political parties;

[2] candidates for political offices, their staffs, and campaign committees; and

[3] candidates, campaign committees, or political parties or organizations in connection with any election to any positions of Presidential or Vice Presidential electors, or Senators or Representatives in or to Congress;

(C) Benefits to the Unions or their officers through:

[1] salaries, benefits, and "overhead" attributable to illegitimate purposes, defined in ¶ 20, *infra*;

[2] defense of actions of the Unions and their officers which are or are alleged to be illegal, including investigations, publicity, fines, attorneys' fees, and court costs; and

[3] expenses in coercing new members or agency fee payers into these barganing units and/or other bargaining units, in other plants, companies, and industries;

(D) Activities for Union members such as:

[1] social and recreational activities;

[2] insurance, medical care, retirement, disability and death plans;

[3] maintenance and payment of benefits from strike funds;

[4] apprenticeship training programs;

[5] scholarship funds;

[6] expenses of conventions and delegates thereto;

[7] union publications; and

[8] contributions to charities; and

(E) For other activities and purposes not requested by Plaintiffs, in which they do not participate, and which are not "statutory activities" as defined in ¶ 20, *infra.*

(17) The accounting and bookkeeping systems of C.W.A. and the Unions were not designed and are not administered and maintained to:

(A) Isolate the costs of collective bargaining or face-to-face negotiations with AT&T or C&P on Plaintiffs' behalf concerning Plaintiffs' wages, hours, and conditions of employment from all other costs, obligations, and expenditures;

(B) Isolate the costs of grievance administration undertaken either [1] at Plaintiffs' request or [2] at the request of bargaining unit members only, from all other costs, obligations, and expenditures;

(C) Isolate costs, expenses, obligations, and expenditures for political activity from all other costs, obligations, and expenditures; nor to

(D) Enable C.W.A. and the other Unions to render to Plaintiffs accurate, timely, and periodic accounts of the isolated costs directly incurred in collective bargaining or face-to-face negotiations with each Company, respectively, on their behalf and grievance administration undertaken at their request, or at the request of bargaining unit members, from all other costs, expenses, obligations, and expendiutres for illegitimate activities as defined in ¶ 20, *infra.*

FIRST CLAIM FOR RELIEF
(Breach of Trust)

(18) Plaintiffs re-allege and incorporate by reference ¶¶ 1-17.

(19) As more specifically set forth in ¶¶ 1-17, C.W.A., as exclusive representative, with the participation of the Unions, has negotiated, and does administer and enforce, under color of law, provisions of the collective bargaining arrangements with AT&T and C&P to coerce agency fees from bargaining unit employees, including Plaintiffs, who decline membership in C.W.A. or the other Unions. These provisions permit C.W.A. and the other Unions to illegally obtain and spend monies of the Plaintiffs without Plaintiffs consent and over their objection for illegitimate activities as defined in ¶ 20.

(20) Plaintiffs assert that the agency fees charged to them under color of law can only include charges for C.W.A.'s cost of collective bargaining, or face-to-face negotiations with the Company on their behalf, and grievance adjustment undertaken at their request, or at the request of other bargaining unit members. (These activities are hereinafter referred to as "statutory activities". The utilization of agency fees for any other activities, such as those listed in ¶ 16, are referred to as "illegitimate activities".)

(21) C.W.A., as recipient of agency fees coerced from Plaintiffs under color of law for designated statutory purposes, is a fiduciary. With respect to these fees it must:

(A) Act toward Plaintiffs with exclusive loyalty;

(B) Pledge these monies for no cost, obligations, or expenditures not incurred for statutory activities;

(C) Estimate the costs directly incurred for statutory activities and charge agency fees for those only;

(D) Divert no agency fees to any other person, group, organization, or corporation without complete assurance that no portion will be used for illegitimate activities;

(E) Keep complete, accurate, and timely financial and other records; and

(F) Render complete, accurate, and timely accounts to Plaintiffs.

(22) Portions of the agency fees obtained by C.W.A. through coercion are transferred to or obligated directly or indirectly for the benefit of the other Unions. The Unions receive these agency fees, or benefits derived from them, with full and complete knowledge that the source of those monies is the Plaintiffs and of the fiduciary obligations of C.W.A. which obtains them. Because of the receipt of these monies and the acceptance of benefits derived from them with this knowledge, these Unions, themselves, are fiduciaries having the same obligations to these Plaintiffs as does C.W.A. These Unions, therefore, must:

(A) Act toward Plaintiffs with exclusive loyalty;

(B) Pledge Plaintiffs' monies for no cost, obligation, or expenditure not caused by statutory activities;

(C) Receive no agency fees without complete assurance that no portion will be used for illegitimate activities;

(D) Keep complete, accurate, and timely financial and other records; and

(E) Render complete, accurate, and timely accounts to Plaintiffs.

(23) Despite the fiduciary obligations outlined in ¶ 21, C.W.A. does not act with exclusive loyalty to Plaintiffs with respect to agency fees coerced from them. Rather, it obligates and expends these monies for activities other than statutory activities. It fails to estimate the costs directly caused by statutory activities and to charge agency fees for those only; it diverts agency fees to persons, groups, organizations, and corporations without assurance that no portion will be utilized for illegitimate activities; it fails to keep complete, accurate, and timely records of its receipts and expenditures; and it fails, despite demand, to render accounts to Plaintiffs.

(24) Despite the fiduciary obligations outlined in ¶ 22, the other Unions do not act with exclusive loyalty to the Plaintiffs with respect to agency fees, or portions thereof, which are obtained by C.W.A. and transferred to, or obligated, directly or indirectly, for the benefit of these Unions. Rather, the Unions utilize these monies for costs, obligations, and expenditures not caused by statutory activities; fail to keep complete, accurate, and timely records of receipts and expenditures; and fail, despite demand, to render accounts to Plaintiffs.

SECOND CLAIM FOR RELIEF
(Duty of Fair Representation)

(25) Plaintiffs re-allege and incorporate by reference ¶¶ 1-17.

(26) C.W.A. voluntarily sought and obtained the opportunity, for its own benefit, to become exclusive representative under color of law for some AT&T and C&P employees with respect to collective bargaining and griev-

ance administration with AT&T and C&P. The employees it represents include Union members and those who have declined Union membership. C.W.A. owes the duty of fair representation to all bargaining unit employees, those who are members, and to those who are non-member agency fee payers, including Plaintiffs.

(27) The duty of fair representation requires that C.W.A. negotiate, execute, administer, and enforce the collective bargaining arrangements on behalf of all employees, including the non-union Plaintiffs, honestly and in good faith, and without negligence, malice, hostile or arbitrary discrimination, and without classifying them invidiously and based upon illegitimate employment classifications.

(28) C.W.A. does not represent Plaintiffs, as non-union employment, without negligence, malice, hostility or arbitrary discrimination, honestly and in good faith, and without classifying them invidiously and based on illegitimate employment classifications. Rather, C.W.A. acts toward non-union Plaintiffs with negligence, malice and hostility, dishonestly and in bad faith, and through classifying them invidiously for reasons other than legitimate employment classifications and does not truly represent them at all. This is done through:

(A) Negotiating with AT&T and C&P to obtain collective bargaining arrangements which supplant Plaintiffs' rights to contract individually;

(B) Negotiating agency fee provisions in collective bargaining arrangements which do not restrict the amounts collected to the direct costs to it of statutory activities;

(C) Enforcing the collective bargaining arrangements with AT&T and C&P by subjecting Plaintiffs to termination if they fail to pay the agency fees which are known to be in excess of that which is required for solely statutory activities;

(D) Diverting funds obtained from Plaintiffs' agency fees to persons, groups, organizations, and corporations with the knowledge and intent that the monies will be used for illegitimate activities; and

(E) Utilizing Plaintiffs' agency fee payments for costs, obligations, and expenditures for illegitimate activities, more fully set forth in ¶ 16.

THIRD CLAIM FOR RELIEF
(Violation of Title 18 U.S.C. § 610)

(29) Plaintiffs re-allege and incorporate by reference ¶¶ 1-17.

(30) The Defendant Unions are labor organizations as described in ¶ 10, and are, therefore, prohibited by Title 18 U.S.C. § 610 from making any direct or indirect payments, loans, advances, deposits, gifts of money, or any services or thing of value, not exempt, to or on behalf of any candidate, campaign committee, or political party or organization, in connection with any election to the positions of Presidential or Vice Presidential electors or Senators or Representatives in or to Congress.

(31) As more fully set forth in ¶ 16, C.W.A. and the other Unions engage in a wide range of agitation, propaganda, and lobbying which includes political activity in violation of Title 18 U.S.C. § 610, in that they do make direct or indirect payments, loans, advances, deposits, and gifts of money, services, or things of value, to or on behalf of candidates, campaign committees, and political parties and organizations, in connection with elections to positions of Presidential or Vice Presidential electors or Senators or Representatives to which no exemption applies.

(32) C.W.A. and the Unions also utilize job discrimination, financial reprisal directed against Plaintiffs, to obtain the agency fees taken as a condition of Plaintiffs' employment. These monies are included and used in the separately maintained campaign funds (AFL-CIO COPE

and C.W.A. COPE) which are required by law to be composed solely of voluntary contributions.

FOURTH CLAIM OF RELIEF

(Breach of Implied Conditions of Contract and Statute)

(33) Plaintiffs re-allege and incorporate by reference ¶¶ 1-17.

(34) As more fully set forth in ¶ 11, C.W.A. is recognized as the exclusive representative of AT&T and C&P employees in a given bargaining unit which includes Plaintiffs. This recognition is under color of law, to wit: Title 29 U.S.C. § 141 *et seq.* and the provisions of collective bargaining arrangements.

(35) That Title does not authorize C.W.A. and the other Union Defendants to obtain and spend Plaintiffs' agency fees for illegitimate activities. Neither does it authorize the Companies to permit C.W.A. and the other Union Defendants to obtain and spend Plaintiffs' agency fees for illegitimate activities.

(36) The collective bargaining arrangements do not authorize C.W.A. and the other Union Defendants to obtain and spend Plaintiffs' agency fees for illegitimate activities. Neither do they authorize the Companies to permit C.W.A. and the other Unions to obtain and spend Plaintiffs' agency fees for illegitimate activities.

(37) The negotiations by AT&T, C&P, C.W.A. and the other Unions resulted in provisions in the collective bargaining arrangements (Article 33) which unlawfully fail to define Plaintiffs' true obligations under Title 29 U.S.C. § 158(a)(3). By these provisions the Companies permit the Unions to obtain and spend, and C.W.A. and the other Union Defendants do obtain and spend, through actual and threatened financial reprisal, job discrimination and termination directed at Plaintiffs, Plaintiffs' agency fees. These monies are then used by C.W.A. and the other

Unions for costs, obligations, and expenditures for illegitimate activities as defined in ¶ 16.

(38) Defendant Companies' actions, without authority, and the Defendant Unions' actions, also without authority, breach implied conditions of statute and contract in violation of Title 29 U.S.C. § 185.

FIFTH CLAIM FOR RELIEF
(Civil Rights Act Claims)

(39) Plaintiffs re-allege and incorporate by reference ¶¶ 1-17.

(40) The described concerted acts and omissions of the Unions, and the Companies constitute a conspiracy to violate Title 42 U.S.C. §§ 1983 and 1985(3), under color of Title 29 U.S.C. § 141 *et seq.*, implemented through:

(A) The negotiation, administration, and enforcement of the collective bargaining arrangement through provisions which unlawfully fail to define Plaintiffs' maximum obligations under Title 29 U.S.C. § 158(a)(3);

(B) The collection, transfer, and expenditure of Plaintiffs' agency fees for illegitimate activities, more fully set forth in ¶ 16; and

(C) The collection of agency fees from Plaintiffs through actual and threatened financial reprisals, and job discrimination and termination.

(41) These acts and omissions of the Companies and Unions are knowingly and intentionally directed against the Plaintiffs for the purpose of:

(A) Forcing Plaintiffs to pay for the Unions' use of their monies for illegitimate activities;

(B) Forcing Plaintiffs to pay more for statutory activities than do Union members;

(C) Depriving Plaintiffs of that increment of the agency fees spent for illegitimate activities; and

(D) Forcing Plaintiffs to conform to the social, economic, political, and ideological causes, philosophies, and credos of the Unions.

(42) The Companies and Unions know that the essential and inevitable effect of these acts and omissions is to abridge and disparage Plaintiffs in the rights secured to them by the United States Constitution and Title 42 U.S.C., including:

(A) Their right to be free from prior restraint in the exercise of their freedoms of speech, thought, petition, and assembly;

(B) Their right to privileges and immunities equal with other citizens of the United States;

(C) Their right to equal protection of the laws; and

(D) Their right to due process of law.

(43) The Defendant Companies, by knowingly permitting an agency fee portion of the collective bargaining arrangement which unlawfully fails to define Plaintiffs' maximum obligations under Title 29 U.S.C. § 158(a)(3), and by collecting and forwarding or causing the agency fees from Plaintiffs to be delivered to the Unions through active or threatened financial reprisal, job discrimination and termination, and by failing to insist that the Plaintiffs be rendered an accounting for agency fees delivered to the Unions, participate in, approve of, and have the power to prevent the forementioned violations of Title 42 U.S.C. § 1985(3) but do not do so, thereby violating Title 42 U.S.C. § 1986.

(44) These acts and omissions of the Companies and the Unions do in fact permit an agency fee provision of the collective bargaining arrangement which unlawfully fails to properly define Plaintiffs' maximum obligations under Title 29 U.S.C. § 158(a)(3); the collection of or causing the Plaintiffs' agency fees to be delivered to the Unions under threat of financial reprisal, job dis-

crimination or outright termination tends to and does coerce Plaintiffs into ideological conformity with and into paying for the social, political, economic, and ideological doctrines, programs, and plans of the Unions. Thereby the Unions obtain and spend Plaintiffs' monies for illegitimate activities, which abridge, deny, deprive, and disparage Plaintiffs in their rights under the United States Constitution and laws, as enumerated in ¶ 42.

SIXTH CLAIM FOR RELIEF
(LMRDA Defense Inapplicable)

(45) As described in ¶¶ 2, and 12, and Affidavits collectively labeled Exhibit "D", Plaintiffs are not members of any labor organization within the definition of that term set out in § 3(o) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 402(o) (1970), but are agency fee payers who pay a dues-equivalent to C.W.A. as a condition of their employment, part of which CWA retains, and part of which is distributed to the other Unions.

(46) The claims which Plaintiffs assert in Counts I-V of this Complaint allege the Unions' breaches of common-law fiduciary duty and the duty of fair representation; breaches of contract under the Labor Management Relations Act of 1947, 29 U.S.C. § 185 (1970); and violations of the Corrupt Practices Act, 18 U.S.C. § 610 (1970), and the Civil Rights Acts, 42 U.S.C. §§ 1983, 1985(3) and 1986 (1970). Plaintiffs base none of their claims on:

(A) Any provision of the LMRDA, 29 U.S.C. § 401 *et seq.* (1959); or

(B) Any matter arising out of a purely *intra*-union case or controversy:

[1] predicated upon the constitution and by-laws of the C.W.A., as opposed to a matter that is in the public domain and beyond the internal affairs of the Unions; and

[2] which can properly be prosecuted in the first instance within the exclusive organizational jurisdiction of the Unions because the Unions have an applicable, reasonable, and otherwise lawful internal procedure and remedy to which this Court may lawfully defer under the doctrine of exhaustion of remedies.

(47) Plaintiffs are receiving and will receive financial and other assistance in this action from the National Right to Work Legal Defense Foundation, Inc. (Foundation), a tax exempt, charitable entity which receives monetary contributions from the general public including employers as that term is defined in § 3(e) LMRDA, 29 U.S.C. § 402(a) (1970). Without such financial and other assistance from the Foundation, Plaintiffs would be unable to prosecute this action.

(48) The principal labor organization Defendants herein are plaintiffs in another action now pending in the United States District Court for the District of Columbia before the Honorable Charles R. Richey. *United Auto Workers, et al. v. National Right to Work Legal Def. Fdn., et al.*, Civ. Action No. 839-73 (filed May 1, 1973). In said action, said Defendants herein allege that § 101(a)(4) LMRDA, 29 U.S.C. § 411(a)(4) (1970), proscribes the Foundation from "directly or indirectly financ[ing], encourag[ing], or participating in, except as a party," certain lawsuits which involve claims similar to those which Plaintiffs raise herein.

(49) Plaintiffs deny that § 101(a)(4) LMRA, 29 U.S.C. § 411(a)(4) (1970), can lawfully be applied to prohibit them from prosecuting this action with monies and other assistance provided by the Foundation, irrespective of the identities of those members of the public who contribute to the Foundation.

BASIS FOR RELIEF

(50) Plaintiffs have no adequate remedy at law for the past, present, and prospective harm, loss, and damage

to them resulting from the acts and conduct of each Defendant as alleged in Counts I-V of this Complaint, because of: the breaches of fiduciary duty, the duty of fair representation, and of a collective bargaining arrangement; the past and continuing extraction from them of monies for uses they do not approve; the abridgment, denial and deprivation of their privileges and immunities of United States citizenship, of their rights to and freedoms of speech, thought, assembly, petition, and association, and their right to have no taking of their property without due process of law; all of which are rights secured under Title 42 U.S.C. §§ 1985(a)(3), and 1986.

PRAYER FOR RELIEF

(51) WHEREFORE, Plaintiffs pray:

(A) For a declaratory judgment based upon the actual, current, and *bona fide* controversy between the parties as to the legal relations among them, pursuant to Title 28 U.S.C. § 2201 and F. R. Civ. P. 57, and holding:

[1] that the modified agency shop portion of the collective bargaining arrangement between the Companies and C.W.A. is invalid on its face, as it fails to define Plaintiffs' obligations under Title 29 U.S.C. § 158(a)(3);

[2] that the modified agency shop portion of the collective bargaining arrangement between the Companies and C.W.A. is invalid as applied, to the extent that it permits C.W.A. and the other Unions to obtain and expend Plaintiffs' monies for illegitimate activities as defined in ¶ 16;

[3] that the modified agency shop portion of the collective bargaining arrangement between the Companies and C.W.A., and the acts of Defendants pursuant to it, violate Plaintiffs' rights to freedom of speech, thought, assembly, petition, and association, their rights to the privileges and immunities of citizens of the United States,

and their entitlement to equal protection of the laws and to due process of law;

[4] that as exclusive representative under Title 29 U.S.C. § 158(a)(3), C.W.A. and the Unions are fiduciaries; and

[5] that § 101(a)(4) LMRDA, 29 U.S.C. § 411(a)(4) (1959), does not prohibit Plaintiffs from receiving financial and other assistance from the Foundation in order to continue the prosecution of this action; and

(B) For injunctive relief which requires the Defendants to:

[1] cease and desist in the enforcement of the modified agency shop provision in any way which violates Plaintiffs' rights and permits the Unions to obtain and spend Plaintiffs' monies for illegitimate activities as defined in ¶ 16;

[2] to account in detail for all allocations, expenditures, and disposition of said funds, including the identity of each recipient—corporate, associate, partnership, invidiual, or otherwise—of said funds; and

[3] to maintain accounting records which:

(a) isolate the costs of collective bargaining on Plaintiffs' behalf with the Company from all other costs, expenses, obligations, and expenditures;

(b) isolate the costs of administering grievance procedures at Plaintiffs' request or at the request of bargaining unit members from all other costs, expenses, obligations, and expenditures;

(c) isolate costs, expenses, obligations, and expenditures for political activity from all other costs, expenses, obligations and expenditures; and

(d) render to Plaintiffs periodic accountings of the isolated costs directly incurred in collective bargaining with

the Companies on Plaintiffs' behalf and grievance administration at their request, or at the request of bargaining unit members and which are not political activity, from all expenditures for any other purposes;

(C) For a permanent injunction restraining the Unions, AT&T, and C&P from enforcing as against Plaintiffs the compulsory union agency fee provision of the collective bargaining arrangement described herein, insofar as such provision is used by the Unions to force payment for purposes other than collective bargaining with AT&T and/or C&P on Plaintiffs' behalf, and administration of grievances at their request or the request of bargaining unit members;

(D) For a judgment allowing Plaintiffs monetary damages for injuries sustained as a result of Defendants' unlawful and unwarranted abridgment and deprivation of Plaintiffs' constitutional and statutory rights; and

(E) For attorneys' fees, costs, punitive damages, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

(Title Omitted in Printing)

ANSWER OF CWA DEFENDANTS

The defendants, Communications Workers of America (CWA), CWA COPE, CWA District II, and CWA Locals 2100, 2101, 2108, 2110 and 2350 (hereinafter collectively referred to as the CWA, defendants) by their attorneys, Matthew A. Kane and Charles V. Koons, answer the complaint herein as follows:

FIRST DEFENSE

1. The allegations of paragraphs (1), (6), (7), (8), (9), (10), (13), (16), (17), (19), (21), (22), (23), (24), (28), (30), (31), (32), (35), (36), (37), (38), (40), (41), (42), (43), (44), (45), (46), and (50) are denied.

2. The allegations of paragraphs (2), (3), (5), (11), (12), (26), (34), and (48), are admitted.

3. The allegations of paragraphs (14), (15), and (47) are within plaintiffs' exclusive knowledge, and defendants are without knowledge or information sufficient to form a belief as to their truth.

4. In paragraph (20), defendants admit that plaintiffs "assert" as alleged, but deny the substance of the assertions.

5. Paragraph 27 states legal conclusions containing plaintiffs' opinions of the law, and no answer is required.

6. In paragraph (49) defendants admit that plaintiffs deny as alleged, but defendants deny the validity of the

substantial allegations and conclusions of law contained therein.

7. The allegations of paragraph (4) are admitted, except that it is denied that CWA is a parent to CWA-COPE.

8. Whenever such allegations appear, CWA defendants deny that any of them "forced" or "coerced" plaintiffs, or any of them, acting "under color of law", but assert that all actions taken by CWA defendants are consistent with the duties and obligations imposed by CWA's status as recognized or certified collective bargaining representative of the plaintiffs under the National Labor Relations Act, and within the proper ambit of its power and authority under that law.

SECOND DEFENSE

9. Plaintiffs lack standing to institute and maintain the present action.

THIRD DEFENSE

10. Plaintiffs' complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

11. Plaintiffs have failed to exhaust available administrative remedies and internal union remedies.

FIFTH DEFENSE

12. The Court lacks jurisdiction over the subject matter of the claims asserted in the complaint.

SIXTH DEFENSE

13. Plaintiffs' claims are barred by the applicable statutes of limitations.

Respectfully submitted,

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Supreme Court, U.S.
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CLERK

No. 86-637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COMMUNICATIONS WORKERS OF AMERICA
and ITS LOCALS 2100, 2101, 2108, and 2110,
Petitioners,

v.

HARRY E. BECK, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

The question presented in the petition for a writ of certiorari is:

> Whether an employee of a private sector employer in an industry to which the National Labor Relations Act applies states a good federal cause of action, under either the NLRA or the First Amendment, by the claim that the union acting as the employee's exclusive representative expends money collected pursuant to a union security provision for purposes to which the employee objects?

In granting the petition, this Court directed the parties to address as well "the applicability of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959)" to the claims presented by plaintiffs.*

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* In addition to the parties listed as petitioners in the caption to this petition, the following entities were listed as appellants-cross-appellees in the court of appeals: CWA Committee on Political Education; Local 2350, CWA; AFL-CIO; AFL-CIO Committee on Political Education; Maryland State AFL-CIO; American Telephone & Telegraph; and C&P Telephone Company of Maryland. (Each of these parties was named as a defendant in the district court, but the case was dismissed or settled as to each of the above-listed parties in the district court, and none is a petitioner here.)

In addition to the individual listed as respondent in the caption to this petition, the following additional individuals were appellees-cross-appellants in the court of appeals and are respondents in this Court: Dorris R. Ambrose; Jacqueline S. Brandon; Mary Anna Cox; Sally B. DiMauro; Rue T. F. Downey; Kathleen A. Heil; John J. Hurley; Harriett Lipschultz; Clay B. Lutz; Barbara McGaughgey; Ronald R. Merkle; Ethel T. Merryman; Doris J. Morrow; Marion F. Northrop; Frances M. Phyllis; Vivian Reedy; Barbara A. Russell; Lois A .Stallings; and Harry B. Swartz, Sr.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The decision of the court of appeals, sitting *en banc*, is reported at 800 F.2d 1280, and is reprinted in the appendix to the petition for a writ of certiorari ("Pet. App.") at 1a-28a. The opinion of the court of appeals' panel that heard the case is reported at 776 F.2d 1187, and is reprinted at Pet. App. 29a-106a. The opinion and order of the district court granting partial summary judgment to plaintiffs and referring the case to a special master for remedial determinations is reported at 468 F. Supp. 93 and is reprinted at Pet. App. 135a-142a. The opinions of the special master and of the district court on appeal from the special master are all unreported and are reprinted at Pet. App. 110a-310a.

JURISDICTION

The *en banc* decision and judgment of the court of appeals were entered on September 12, 1986. The petition for a writ of certiorari was filed on October 17, 1986 and was granted on June 1, 1987. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent statutory and constitutional provisions are reprinted as an appendix to this brief at pp. 1a-3a.

STATEMENT OF THE CASE

The Communications Workers of America ("CWA" or "the Union"), petitioner herein, is the exclusive representative of employees of the American Telephone and Telegraph Company ("AT&T") and the Chesapeake and Potomac Telephone Company of Maryland ("C&P"). Pursuant to collective bargaining agreements between

the Union and the Companies, all the employees represented by the Union, including nonmembers, are required, as a condition of employment, to pay to the Union an "agency fee" in an "amount equal to the periodic dues" paid by union members.

This action was commenced on June 3, 1976 by twenty individual plaintiffs, respondents herein, who at all times relevant were employed at AT&T or C&P and who elected not to become union members. Plaintiffs' complaint alleges that the "union security" clause in the collective-bargaining agreement deprives plaintiffs of a variety of common law, statutory and constitutional rights.[1]

On March 16, 1979, the district court, acting *sua sponte*, granted partial summary judgment to plaintiffs. That court concluded that "collect[ing] from the plaintiffs amounts beyond that allocable to collective bargaining, contract administration and grievance adjustment . . . violates the First Amendment rights of the plaintiffs," and the district court therefore held that the Union was required "to refund to each plaintiff for every year since January 1, 1976, an amount reflecting that portion of his dues-equivalent agency fees which was spent for purposes other than collective bargaining, contract admin-

---

[1] Union security clauses are of two general types. "Agency shop" agreements require covered employees to pay an "agency fee" in an amount equal to union dues; "union shop" agreements require the covered employees to become members of the union which entails paying union dues within a specified period of time after hire. But under *NLRB v. General Motors*, 373 U.S. 734, 742 (1963), "membership" has been "whittled down to its financial core," which is to say that "membership, insofar as it has significance for employment rights, may . . . be conditioned only upon payment of fees and dues." Accordingly, "although a union shop denies an employee the option of not formally becoming a union member, under federal law it is the 'practical equivalent' of an agency shop." *Abood v. Detroit Board of Education*, 431 U.S. 209, 217 n.10 (1977). For that reason, in this brief we use the generic term "union security agreement" to refer to agency shop and union shop agreements. *See also* p. 24 infra (discussing closed shops).

istration, and grievance adjustment." *Id.* at 141a-142a. The district court referred the case to a special master to determine the amount of the refund.[2]

On appeal, a divided panel of the United States Court of Appeals for the Fourth Circuit affirmed the district court's judgment as to liability. The Union then sought rehearing *en banc* which the court of appeals granted.

On rehearing, the *en banc* court, by a vote of 6-4, reaffirmed the judgment of the panel. The majority of that court was unable to agree upon a single rationale or an opinion to explain its decision, but instead issued a brief *per curiam* order which recorded that five judges voted to affirm the judgment on the basis of § 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(3) ("NLRA" or "the Act"); two of these judges also relied on the First Amendment to the United States Constitution in voting to affirm; and one additional judge (Murnaghan, J.) disagreed with the majority and agreed with the dissenters on all other issues but was persuaded that the Union by negotiating and entering into the union security agreement breached its statutory duty of fair represntation under the NLRA.[3] The order of the *en banc* court thus concluded:

---

[2] After receiving and reviewing two reports from a special master, the district court eventually entered a judgment fixing the amount of the refund and mandating certain procedures to be followed in the future by CWA in collecting fees from plaintiffs. *See* Pet. App. 107a-09a. The propriety of these rulings, as modified by the court of appeals, is not before the Court at this time.

[3] The judges who voted to affirm on the basis of § 8(a)(3) also invoked the duty of fair representation, *see* Pet. App. 5a, but it is unclear from the *per curiam* order whether for these judges the fair-representation violation was entirely derivative of the § 8(a)(3) violation, or whether these judges attached independent significance to the duty of fair representation in this context. Judge Murnaghan made clear in his concurring opinion on rehearing *en banc* that he was of the latter view; indeed, Judge Murnaghan alone found a fair-representation violation but no § 8(a)(3) violation.

The result is that 6 judges of the Court voted to sustain federal jurisdiction over the cause, though in some instances on somewhat varying grounds. [*Id.* at 6a].

SUMMARY OF ARGUMENT

I. Of the claims considered by the courts below, two fall within the jurisdiction of the federal courts but one does not. *San Diego Unions v. Garmon*, 359 U.S. 236 (1959), bars the federal (and state) courts from entertaining a claim which seeks relief on the theory that the defendant has violated § 8(a)(3) of the National Labor Relations Act because the National Labor Relations Board has exclusive primary jurisdiction to interpret that Act. But under *Vaca v. Sipes*, 386 U.S. 171 (1967), the *Garmon* doctrine does not bar the federal courts from entertaining a claim that the union breached its duty of fair representation, even though such a claim may be brought before the Labor Board as well. And the *Garmon* doctrine does not preclude the courts from entertaining constitutional challenges to the NLRA, or to conduct regulated by the NLRA, since the Labor Board does not adjudicate such claims. Pp. 6-10 *infra*.

II. On the merits of plaintiffs' fair representation claim, it is our primary submission that in enacting the NLRA Congress specifically decided to leave unions free to negotiate union security agreements of the type involved here, and that therefore CWA's conduct in negotiating and enforcing such an agreement cannot violate the duty of fair representation. That duty, as this Court has held, is a "statutory" duty, one that is implied from the NLRA. Because that is so, it would make no sense to hold a union guilty of a fair-representation violation if the union did only that which Congress, in enacting the NLRA, intended to leave the union free to do. We therefore demonstrate at some length that both the plain language of § 8(a)(3) and its legislative history compel the conclusion that Congress decided not to proscribe union

security agreements requiring all members of a bargaining unit to pay an amount equal to union dues. (Because we rely on § 8(a)(3) to define the scope of the fair-representation duty, it is incumbent upon the Court, in exercising its jurisdiction over the fair-representation claim, to resolve this issue of statutory interpretation.) Pp. 21-40, 43-45 *infra.*

We recognize, of course, that this Court has concluded that § 2, Eleventh of the Railway Act does proscribe union security agreements of the type involved here. But as we show, the structure and history of the RLA are materially different from the NLRA with respect to the matters at issue in this case and as a result the considerations that underlay the RLA decisions compel precisely the opposite conclusion here. Pp. 40-43 *infra.*

There is a second and independent reason why plaintiffs' fair-representation claim must be rejected: even without the guidance provided by § 8(a)(3), there would be no basis for concluding that a union acts arbitrarily, discriminatorily, or in bad faith by requiring all persons in a bargaining unit to pay the same amount to the union, or by using dues money to engage in activities away from the bargaining table that further the interests of the workers the union represents. Pp. 45-48 *infra.*

Fianlly, plaintiffs' First Amendment claim fails for a very simple reason: the actions of the CWA and the private employers with which it deals in negotiating and enforcing union security agreements are private actions, and not actions attributable to the state. As this Court has recognized, the basis on which the Court found state action with respect to union security agreements negotiated in an industry regulated by the RLA is lacking with respect to union security agreements in industries to which the NLRA applies. And there is no other basis on which the conduct of these private parties can be imputed to the State. Pp. 12-21 *infra*

ARGUMENT

I. THE APPLICABILITY OF *GARMON*.

A. Five members of the *en banc* court "voted that federal jurisdiction 'over plaintiffs' statutory suit against defendant union under § 8(a)(3) [of the NLRA] . . . was properly invoked under 28 U.S.C. § 1337.'" Pet. App. 5a. This ruling is plainly wrong. *San Diego Unions v. Garmon*, 359 U.S. 236 (1959), bars the federal courts from entertaining a claim which seeks relief on the theory that the defendant has violated § 8(a)(3) (or its cognate provision dealing with unfair labor practices committed by labor unions, § 8(b)(2)). In *Garmon* the Court held: "When an activity is arguably subject to § 7 of § 8 of the Act, the States *as well as the federal courts* must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." 359 U.S. at 245 (emphasis added).

Although most of the cases in the *Garmon* line have involved the jurisdiction of state courts to grant relief, the quoted passage makes clear that its holding precludes federal court jurisdiction likewise. This is because the rationale of the doctrine is not that the NLRA works a substantive supercession of state law, but that the exclusive primary jurisdiction to determine whether there has been a violation of NLRA § 8 is vested in the National Labor Relations Board ("NLRB"). As the Court also said in *Garmon*: "It is essential to the administration of the Act that these determinations [as to the scope of § 8] be left in the first instance to the National Labor Relations Board." 359 U.S. at 244-245.[4]

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[4] The Court has frequently used the phrase "primary jurisdiction" to describe the basis of the *Garmon* doctrine. *See e.g., Machinists v. Wisconsin Empl. Rel. Comm'n*, 427 U.S. 132, 138 (1976), *quoting Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383, n.19 (1969); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982); *Brown v. Hotel Employees*, 468 U.S. 491, 502 (1984).

The only explanation given below for exercising jurisdiction over the asserted violation of § 8(a)(3) notwithstanding *Garmon* is that of Judge Russell writing for the panel majority. He reasoned that since there is

> jurisdiction under section 1337 over a statutory claim under section 2, eleventh [of the Railway Labor Act 49 U.S.C. §§ 151 *et seq.* ("RLA")] . . . by the same token there is jurisdiction over the statutory claim under section 8(a)(3) here.

This reasoning is fallacious. The NLRA establishes an administrative agency to determine whether an unfair labor practice has been committed, whereas suits for violation of the RLA are committed exclusively to the courts. *See Chicago & N.W.R. Co. v. Transportation Union*, 402 U.S. 570 (1971).

B. Both the five-judge plurality and Judge Murnaghan concluded that there is federal jurisdiction to decide plaintiffs' claim that the Union had violated its duty of fair representation. Pet. App. 5a. We agree that, on the authority of *Vaca v. Sipes*, 386 U.S. 171, 176-188 (1967), the federal courts do have such jurisdiction.

In *Vaca*, the union "challenged the jurisdiction of the Missouri courts" over a complaint which this Court construed to allege a breach of the duty of fair representation [5]; the union argued that plaintiff's claim fell "within the exclusive jurisdiction of the NLRB" under *Garmon*. *See Vaca*, 386 U.S. at 176. This Court squarely "reject[ed] this argument," *id.* at 177, and held "the *Garmon* preemption doctrine inapplicable" in the fair-representation context, *id.* at 188.

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[5] The complaint in *Vaca* alleged what the plaintiff, in his brief to this Court, described as "an uncomplicated action by an agent against his principal, under Missouri law for arbitrary and malicious failure to perform the principal's contractual duty." Br. for Resp. in U.S. No. 114 at 5. This Court concluded, however, that because the Union's "duty [is] grounded in federal statutes . . . federal law therefore governs [plaintiff's] cause of action." 386 U.S. at 177.

Although *Vaca* involved a complaint over the manner in which the union had handled a contractual grievance, and although the Court's analysis relied in part on "some intensely practical considerations . . . which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts," *id.* at 183, the holding of *Vaca* is not limited to the contract-enforcement context. From the first, the duty of fair representation, and the judicial cause of action for breach of that duty that has been "judicially 'implied from the statute,'" *Electrical Workers v. Foust*, 442 U.S. 42, 47 (1978), *quoting Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 204 (1944), have been understood to address a union's actions in negotiating as well as in enforcing a collective bargaining agreement. Indeed, *Steele* itself as well as *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) were contract-negotiation cases. Against this background, *Vaca*'s exception to the *Garmon* preemption rule must be understood to protect the courts' jurisdiction over fair-representation claims involving either the negotiation or the enforcement of a labor contract.

The holding of *Vaca* with respect to the court's jurisdiction raises a quite separate, and not yet fully resolved, series of questions concerning the relationship between the fair-representation cause of action and the jurisdiction of the NLRB. For example, at the very least it seems clear that the courts should not allow the rubric of the duty of fair representation to be used to create a judicial cause of action for unfair labor practices, thereby enabling the courts to do precisely that which *Garmon* says may not be done. *Vaca* itself proceeds from the premise that the duty of fair representation has a specific and limited office within the framework of the NLRA: to provide a "bulwark to prevent arbitrary union conduct." 386 U.S. at 182. Thus, under *Vaca*, it is not necessary for the courts, in exercising their fair-representation jurisdiction, to decide whether the defendant union trans-

gressed some prohibition contained in § 8(b) because proof of such a transgression does not establish a fair-representation violation; rather, a fair-representation plaintiff, to prove his case, must meet the separate legal standard stated in *Vaca* by establishing that the Union engaged in conduct which is "arbitrary, discriminatory or in bad faith," 386 U.S. at 190.

The Seventh Circuit has suggested that the courts should be more circumspect and "limit" the "fair representation doctrine . . . to avoid inappropriate interference with the National Labor Relations Board's exclusive jurisdiction over unfair labor practices." *Baker v. Amsted Industries, Inc.*, 656 F.2d 1245, 1250 (7th Cir. 1981). It is not clear precisely what the Seventh Circuit's envisions in this regard and to what extent that court proposes to hold that the fair representation cause of action does not extend to conduct which constitutes an independent violation of NLRA § 8(b). Nor has this Court ever addressed that question in terms.[6]

Given the jurisdictional holding of *Vaca*, the questions referred to above are *merits* issues pertaining to the substance of the fair representation cause of action, *viz.*, to what extent should substantive rules be developed which limit that cause of action in order to protect the province of the NLRB. We explore some such issues *infra* at 43-44, insofar as the issues pertain to plaintiffs' claim here. But for present purposes it suffices to note that under

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[6] The NLRB is of the view that § 8(b)(1) incorporates the duty of fair representation and that therefore every violation of that duty constitutes an unfair labor practice as well. *See Miranda Fuel Co.*, 140 NLRB 181 (1962), *enf. denied*, 326 F.2d 172 (2d Cir.). *Vaca* holds that the Board's belated assertion of jurisdiction over fair-representation claims—whether or not proper, *see DelCostello v. Teamsters*, 462 U.S. 151, 170 (1983)—does not suffice to justify denying victims of such wrongs a judicial remedy. But neither *Vaca* nor any other decision of this Court addresses whether the fair-representation cause of action should be limited so as to preclude relief in cases in which the conduct at issue has traditionally constituted an independent unfair labor practice.

Vaca at least this much is clear: the federal courts have *jurisdiction* to decide such issues in the course of adjudicating the merits of various fair-representation claims. Thus, the lower courts properly exercised jurisdiction over the fair-representation claim here.

The *Vaca* jurisdictional holding is significant in one other respect here. In authorizing the courts to decide whether a union has breached its statutory duty of fair representation, *Vaca* necessarily authorizes—indeed requires—the courts to determine the scope of that duty in light of the entire NLRA, including the provisions which specify what is lawful and is not lawful thereunder. *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975), and *Kaiser Steel Corp.* v. *Mullins*, *supra*, 455 U.S. at 85, both teach that "the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies." That rule applies *a fortiori* in the present context. Because the duty of fair representation is itself "judicially *implied*" from the NLRA, the courts must, in deciding whether certain conduct violates that duty, consider at the outset whether Congress has, in that same statute, determined that such conduct would not be unlawful under federal law.

C. Plaintiffs' claim under the First Amendment is not subject to the primary jurisdiction of the Labor Board under the *Garmon* doctrine. It is the courts, rather than the Board, which are "the primary tribunals," 359 U.S. at 244, to adjudicate such issues as the meaning of the Constitution, and whether there is the requisite "state action" to bring the Constitution into play. As the Court reaffirmed in *Johnson v. Robison*, 415 U.S. 361, 368 (1974): "Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." The Board itself has long understood this:

> As an administrative agency of the Federal Government, it is inappropriate for the Board to pass upon questions regarding the constitutionality of Congressional enactments. Such questions will be left to the courts. [*Rite-Form Corset Co.*, 75 NLRB 174, 176 (1947).]

II. THE MERITS OF PLAINTIFFS' CLAIMS.

As we have seen, the lower courts properly exercised jurisdiction over one of plaintiffs' statutory claims—the claim of breach of the duty of fair representation—as well as over plaintiffs' constitutional claim. Those two claims present alternative legal theories by which plaintiffs challenge the conduct of the Union (and the employers) in negotiating and enforcing a union security agreement.

With respect to plaintiffs' statutory claim, it is our primary submission that in enacting the NLRA Congress specifically decided not to prohibit union security agreements of the type involved here, and that therefore CWA's conduct in negotiating and enforcing such an agreement cannot violate the duty of fair representation. With respect to plaintiffs' constitutional claim, we contend that the claim fails for lack of state action.

Because the presence *vel non* of state action is relevant both to the statutory as well as to the constitutional question—if state action were present plaintiffs' attack on the statute would raise a colorable constitutional claim which the Court might seek to avoid through a limiting construction of the NLRA—we begin by demonstrating that plaintiffs are challenging only private conduct. We then show that Congress expressly decided not to prohibit such conduct. Finally, we draw the lessons of this analysis for the specific claims presented here.

One preliminary observation is in order. We realize, of course, that in *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), this Court concluded that the negotiation of a union security agreement in an industry regu-

lated by the *Railway Labor Act* constitutes action attributable to the government, and that in *Machinists v. Street*, 367 U.S. 740 (1961), the Court concluded, largely because of *Hanson*, that the RLA does not permit the unions and employers covered by that Act to require those who object to supporting the union to pay the full amount of union dues. But as this Court has cautioned, "[e]ven rough analogies [between the NLRA and RLA] must be drawn circumspectly with due regard for the many difference between the statutory schemes." *Brotherhood of Railway Trainmen v. Jacksonville Terminal Co., supra*, 394 U.S. at 383.[7] As we shall show—and as the Second Circuit, *see Price v. Auto Workers*, 795 F.2d 1128 (2d Cir. 1986), *pet. for cert. pending*, No. 86-1055, and five of the ten judges below concluded—the structure and history of the RLA are materially different from the NLRA with respect to the matters at issue in this case and as a result the considerations that led to the decisions in *Hanson* and *Street* compel precisely the opposite conclusion here.

A. The Governmental Action Issue.

It is, of course, undisputed, that neither CWA nor its local affiliates are agencies of the federal government or of any state or local government. Nor are the employers here—AT&T and C&P—government agencies. The relevant question then, for state-action purposes, is whether the conduct of these *private* entities in negotiating and enforcing a union security agreement "may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1975).[8]

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[7] *Cf. Burlington & Northern Railroad v. Brotherhood of Maintenance of Way Employees*, —— U.S. ——, 55 L.W. 4576 (April 28, 1987) (holding that RLA union is free to engage in secondary activity of a type proscribed by NLRA § 8(b)(4)).

[8] Because this case involves purely private actors, it is entirely unlike *Abood v. Detroit Board of Education, supra* n.1. There the employer was a public entity—a school board—and its ac-

Just last Term, in *San Fran. Arts & Athletics v. USOC*, —— U.S. ——, 55 L.W. 5061 (June 25, 1987), this Court reaffirmed the well-settled test for determining when private conduct is to be imputed to the government:

> [A] government "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." [*Id.* at 5067, *quoting Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) and *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982).]

"Careful adherence" to this "requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmonson*, 457 U.S. 922, 936 (1982).

Measured by that test, the instant case plainly involves purely private conduct. There can be no claim that the government "coerced" the parties to include a union security provision in their collective bargaining agreement. As even the panel majority below recognized, federal law with respect to the subject of union security agreements is merely "permissive": the law allows, but does not require such agreements, and "unless both [the employer and the union] give their permission there can be no [union security] contract." Pet. App. at 66a. Nor does federal law in any way "encourage" the making of union security agreements. No federal benefit is conferred on parties which agree to such a provision nor is any detriment visited upon parties who do not so agree. As this Court repeatedly has held, the "fundamental premise" of the national labor policy is "freedom of collective bargaining—'private bargaining under governmental su-

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tions in negotiating and enforcing a union security agreement, like all of its actions, constituted acts of the state. *See* 431 U.S. at 226 ("the actions of public employers surely constitute 'state action' "). Remarkably, the district court and the panel majority below failed to recognize this fundamental distinction between *Abood* and the instant case. *See* Pet. App. at 67a-68a.

pervision of the procedure alone, without any official compulsion over the actual terms of the contract.'" *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 272, 287 (1974). Chief Judge Winter put the point well in his dissenting opinion below:

> Federal legislation has not compelled the establishment of unions, nor has it compelled or even encouraged the adoption of agency shop agreements . . . Indeed, the NLRA does not compel the acceptance of any collective-bargaining terms. Rather, the employees, employers, and unions make these choices. [Pet. App. 12a; *see also Price v. Auto Workers*, *supra*, 795 F.2d at 1133].

Accordingly, the action of CWA and the Company in negotiating a union security agreement cannot be attributed to the federal government under the rule stated in *Blum v. Yaretsky*, *supra*, and reaffirmed in *San Francisco Arts & Athletics*. Indeed, that conclusion is far more obvious in this case than in *Yaretsky*.

The latter case involved a challenge to decisions made by the utilization review committees of various nursing homes to transfer the plaintiffs to facilities providing a lower level of care than the nursing homes in which the plaintiffs were living. Federal law mandated the establishment of these review committees, 457 U.S. at 994, federal law required the nursing homes "'to make all efforts possible to transfer patients to the appropriate level of care,'" *id.* at 1007-08, and federal law "impose[d] a range of penalties on nursing homes that fail to discharge or transfer patients whose continued stay is inappropriate," *id.* at 1009. Nonetheless the *Yaretsky* Court concluded that because federal law "do[es] not dictate the decision to discharge or transfer in a particular case," *id.* at 1010—*viz.*, because the transfer decisions themselves "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State," *id.* at 1009—the transfer decisions could not be imputed to the

state. *A fortiori* in this case, in which the challenge is to "judgments made by private parties" without any federal intervention whatsoever, the conduct at issue must be deemed to be private conduct.[9]

2. The two judges below (Russell and Chapman, JJ.) who found state action present here offered (in their opinion as the panel majority, to which they adhered on rehearing *en banc*, *see* Pet. App. 5a) two reasons for their state-action conclusion; neither is well-founded.

(a) First, Judges Russell and Chapman suggested that the government is implicated in union-security agreements in industries regulated by the NLRA because the NLRA "authorizes an employer and a union to enter into" such agreements and the Act thereby "cast[s] the weight of the Federal Government behind the agreements just as surely as if it has imposed them by statute.'" Pet. App. at 70a. But the only respect in which the NLRA "authorizes" union security agreements is that, by virtue of a proviso to § 8(a)(3) of the Act, such agreements are saved from condemnation by that section's otherwise blanket prohibition on discrimination against nonmembers of a union. In other words, the NLRA does nothing more than permit the parties to negotiate union security agreements.

Just last Term, this Court made clear that a statutory provision exempting certain private conduct from an otherwise applicable statutory prohibition does not transform the private conduct into state action. *See Church of Jesus Christ of Latter-Day Saints v. Amos*, —— U.S. ——, 55 L.W. 5005, 5008 & n.15 (June 24, 1987) (al-

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[9] *See also Jackson v. Metropolitan Edison Co., supra,* (decision of privately-owned public utility to terminate service not attributable to the state); *Rendell-Baker v. Kohn, supra* (decision of private school to discharge employee not attributable to state); *San Francisco Arts & Athletics v. USOC, supra* (decision of federally-chartered corporation not to allow use of term "Olympic" not attributable to state).

though religious employers are exempted from Title VII's prohibition on religious discrimination, their actions are not "fairly attributed to the Government"). That holding represents a specific application of a more general and well-established principle: the fact that a private party is "authorized to employ . . . a practice if it so desires" does not render the "exercise of the choice allowed by state law" into action of the state "where the initiative comes from the [private party] and not from the State." *Jackson v. Metropolitan Edison Co., supra*, 419 U.S. at 357. Indeed, even governmental "approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives." *Blum v. Yaretsky, supra*, 457 U.S. at 1004-05; *see San Fran. Arts & Athletics v. USOC, supra*, 55 L.W. at 5067 (same). Thus the fact that the union security agreements here are not made unlawful by—and in that sense alone may in colloquial terms be said to be "authorized" by—NLRA § 8(a)(3) does not support attributing such agreements to the government.

(b) Judges Russell and Chapman alternatively argued that the government is implicated in privately-negotiated union security agreements because a union's authority to negotiate such agreements " 'is grounded directly on the power given [the union] as a result of its status as bargaining representative.' " Pet. App. 702. It is, of course, true that the NLRA confers on a union that is designated as the bargaining representative by a majority of employees in an appropriate bargaining unit the status of exclusive representative of all employees in that unit and allows such unions to negotiate on behalf of all those employees. To that extent the NLRA can be said to vest those unions which enjoy the status of exclusive representative with the authority to negotiate for a union security agreement binding on all the bargaining unit employees.[10]

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[10] It should be noted, however, that in the absence of the NLRA, and of any state-law prohibition, a union and an employer could

But as Chief Judge Winter aptly stated below:

> Monopoly status, which is what the right to be exclusive bargaining agent gives the union, is by itself insufficient to make a private party's acts state action. The issue was settled in *Jackson v. Metropolitan Edison.* The Supreme Court there held that government-conferred monopoly power alone was insufficient to establish state action in the context of a due process claim against an electrical utility. [Pet. App. at 100a; dissenting opinion].

This teaching of *Jackson v. Metropolitan Edison* is confirmed by last Term's decision in *San Fran. Arts & Athletics v. USOC.* That case involved a challenge to the United States Olympic Committee's ("USOC") refusal to allow San Francisco Arts & Athletics, Inc. ("SFAA") to use the word "Olympic" in connection with an athletic competition the SFAA was planning to hold. The USOC was created by the federal government as a federally-chartered corporation, and the USOC was granted by Congress exclusive use of the word "Olympic." Nonetheless, the Court concluded that USOC's action in refusing to license SFAA is not state action:

> The USOC's choice of how to enforce its exclusive right to use the word "Olympic" simply is not a governmental decision. There is no evidence that the Federal Government coerced or encouraged the USOC in the exercise of its right. At most, the Federal Government, by failing to supervise the USOC's use of its rights, can be said to exercise "[m]ere approval of or acquiescence in the initiatives" of the USOC. This is not enough to make the USOC's actions those of the Government. Because the USOC is not a governmental actor, the SFAA's claim that

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agree that the employer would only employ union members or only employ persons who agree to pay dues to the union. Indeed, as the United States points out in its brief *amicus curiae* in this case, "[e]mployers and unions established all types of union security agreements . . . before the NLRA was enacted." U.S. Br. at 24.

> the USOC has enforced its rights in a discriminatory manner must fail. [55 L.W. at 5067-68] [11]

Indeed, any other rule would sweep within the state action doctrine vast expanses of private activity. As the Court observed in *San Francisco Arts & Athletics*, "[a]ll corporations act under charters granted by a government, usually by a State," 55 L.W. at 5067; if any action which a state has empowered a private party to take were deemed action of the state, all corporate action would have to be so labeled. Similarly, under the theory of Judges Russell and Chapman, every union which enjoys the status of exclusive representative would engage in state action in negotiating a collective bargaining agreement as in all such cases the union's authority is

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[11] Four Justices dissented in *San Francisco Arts & Athletics* from the majority's finding of no state action, but adoption of the dissenters' theories would not have led to a state action finding here.

Justice Brennan's dissenting opinion advanced two grounds for finding state action in that case. First, Justice Brennan concluded that "the USOC performs a distinctive, traditional governmental function: it represents this Nation to the world community." 55 L.W. at 5068. That, of course, is not true of unions whose function is to represent *employees* in seeking to secure favorable terms and conditions of employment.

Second, Justice Brennan found that the "USOC and the Federal Government exist in a symbiotic relationship sufficient to provide a nexus between the USOC's challenged action and the Government." *Id.* at 5070. *See also id.* at 5068 (O'Connor and Blackmun, JJ., dissenting) (agreeing with Justice Brennan that the USOC and the government "are joint participants in the challenged activity"). In this regard, Justice Brennan stressed that the USOC provides the United States "an exclusive and effective organization to coordinate and administer all amateur athletics related to international competition" and that "in the eye of the public . . . the connection between the decisions of the United States Government and those of the United States Olympic Committee is profound." *Id.* at 5070. None of that is true here. The NLRA creates a system of collective bargaining which grants unions and employers certain rights and duties, but the government is not otherwise entangled with labor unions.

"grounded directly on the power given it" by the NLRA. Yet this Court has squarely rejected that contention on several occasions, holding union conduct to be private notwithstanding the union's status as exclusive representative. *See Steelworkers v. Weber*, 443 U.S. 193, 200 (1979) (collectively-bargained affirmative action plan "does not involve state action"); *Steelworkers v. Sadlowski*, 457 U.S. 102, 121 n.16 (1982) (union rule precluding candidates for union office from accepting campaign contributions from nonmembers "does not involve state action").

3. As previously noted, in *Railway Employes' Dept. v. Hanson, supra*, the Court found a union security agreement negotiated in an industry regulated by the RLA to be attributable to the state. But the Court's reasoning in *Hanson* has no relevance to union security agreements in industries regulated by the NLRA.

Like NLRA § 8(a)(3), RLA § 2, Eleventh permits unions and employers to enter into union security agreements if the parties so desire. But *unlike* NLRA § 8(a)(3), RLA § 2, Eleventh goes on to grant privately-negotiated union security agreements the force of federal law in the sense that such agreements *supersede any contrary state law*. This element of the RLA was critical to *Hanson*: it was because of the RLA's preemptive force that the Court in *Hanson* found that "justiciable questions under the First and Fifth Amendments were presented" by RLA 2, Eleventh. 351 U.S. at 231-32. Writing for the Court Justice Douglas reasoned that but for the RLA, the union security agreement at issue there would have been unlawful under the laws of the State of Nebraska and that therefore the "action on the part of Congress is a necessary part of every union shop contract . . . for without it such contracts could not be enforced." *Id.* at 231.[12] Justice Douglas added:

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[12] Even in a state like Maryland, which does not presently have a "right-to-work" law banning union security agreements, an

> If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed. The enactment of the federal statute authorizing union shop agreements in the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction. [*Id.* at 231-32; citations omitted].

In sum, as Justice Stewart recognized in his opinion for the Court in *Abood*, *Hanson* "reasoned that government action was present" because "[h]ad it not been for the federal statute, the union-shop provision at issue in *Hanson* would have been invalidated under Nebraska law"; in other words, it was because the RLA "preempts any attempt by a State to prohibit a union-shop agreement" that the Court in *Hanson* attributed the union security agreement to the government. *Abood*, *supra*, 431 U.S. at 218-19 n.12.

Hanson thus takes the state action doctrine quite far to reach private conduct which would be unlawful but for some act of the federal government or which enjoys an immunity from regulation granted by the federal government. Under that approach certain state laws which protect private parties against adverse action by other private parties create, as a matter of constitutional law, an indefeasible right. The *Hanson* opinion does not explain why—and we do not understand under the general state action theory why—federal action deregu-

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agreement negotiated in an industry regulated by the RLA stands on a different footing than an agreement negotiated in an industry covered by the NLRA because the former agreement enjoys a federally-conferred immunity from state regulation whereas the latter agreement does not and may be proscribed at any time. Thus, contrary to the panel majority below (*see* Pet. App. at 58-59a) the theory of *Hanson* can be understood to extend to *all* union security agreements negotiated under the RLA, and not just to those negotiated in states in which the preemptive force of the RLA is required to overcome an existing state prohibition.

lating an area previously regulated by one of the fifty states makes all private action freely undertaken by private parties thereafter, state action. But whatever *Hanson's* basis may be, the state action doctrine as enunciated in that case does *not* sweep in private agreements negotiated in an industry regulated by the NLRA. For unlike RLA § 2, Eleventh, *the NLRA does not dispute state laws which regulate union security agreements*; to the contrary NLRA § 14(b), 29 U.S.C. § 164(b), expressly preserves state authority in these matters. This distinction between the NLRA and the RLA was acknowledged both in *Hanson* itself, 351 U.S. at 323 n.5, and also in *Abood*, 431 U.S. at 218 n.12. *See also* Pet. App. 102a-04a (Winter, C.J., dissenting); *Price Auto Workers, supra*, 795 F.2d at 1132.

Given the NLRA's express anti-preemption provision saving the fifty states' regulatory authority to prohibit or permit union security agreements, the critical element of the state action ruling in *Hanson* is absent here. Accordingly, this case is controlled not by *Hanson* but by the line of cases from *Jackson v. Metropolitan Edison* to *San Francisco Arts & Athletics v. USOC.*

B. The Statutory Question.

1. *The Statutory Language.*

"The starting point in statutory interpretation is the language of the statute itself." *United States v. James*, —— U.S. ——, 54 L.W. 5030, 5033 (July 2, 1986). The language of NLRA § 8(a)(3) "is not ambiguous," *Radio Officers Union v. Labor Board*, 347 U.S. 17, 42 (1954), and speaks directly to the issue posed in this case.

Section 8(a)(3) begins by making it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." Standing alone, that prohibition would effectively outlaw employers from negotiating or complying with union security agreements. Similarly, if the prohibitory words of

§ 8(a)(3) were unqualified, unions would be precluded from negotiating or enforcing union security agreements since § 8(b)(2) makes it unlawful for a union "to cause or attempt to cause an employer to violate § 8(a)(3).

But the prohibitory words of § 8(a)(3) do *not* stand alone; that prohibition—and consequently the derivative prohibition on union action in § 8(b)(2)—are qualified by two provisos. The first privoso expressly recognizes the legality under federal law of certain types of union security agreements:

> Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the latter . . .

The second proviso limits the reach of the first but does so in a way that reinforces the first proviso's recognition of the legality under the NLRA of agreements of the type at issue here; this second proviso states:

> Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Read together, the meaning of § 8(a)(3) and its provisos could not be clearer. The brief *amicus curiae* for the United States in this case (which states the views to the National Labor Relations Board with respect to the meaning of § 8(a)(3), *see* U.S. Br. at 9 n.7), draws the lesson of the statutory language in the following terms:

> The plain language of these provisos appears to permit an employer (and hence a union) to enter into an agreement requiring all employees, including dissenters, as a condition of their continued employment, to pay uniform periodic dues and initiation fees. [U.S. Br. at 12].

And nothing in the statutory language

> give[s] any employee, union member or not, the right to pay less than the full amount of regular dues and initiation fees charged to all other employees. To the contrary, the second proviso permits an employer to terminate any "employee," pursuant to an agreement permitted by the first proviso, if the employee fails "to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in the union. [*Id.* at 13].

Thus, as the Solicitor General concludes, the holding below that respondents are entitled to pay less than full union dues because they object to certain of the union's activities "cannot be derived from the plain language of the statute." *Id.*[13]

2. *The Legislative History.*

There is a "strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, —— U.S. ——, 55 L.W. 4313, 4316 n.12 (March 9, 1987). Thus, absent "clearly expressed legislative intent contrary to that language," *id.*, the statutory

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[13] It is worth noting that the Board's submission to the Court in this case reflects the Board's consistent position both in its decisions, *e.g.*, *Union Starch & Refining Co.*, 87 NLRB 779 (1949), *enf'd* 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815; *Detroit Mailers Union No. 40 (Detroit Publishers Ass'n)*, 192 NLRB 952 (1971), and also in its prior briefs in this Court. For example, in *NLRB v. General Motors Corp.*, *supra*, the Board advised the Court that under the Act employee payments under union security agreements "go to defray not only expenses of collective bargaining . . . but also to finance welfare benefits and promote unionization, lobbying and political activity." Br. for the U.S. at 38, Oct. Term, 1962, No. 404.

language "must ordinarily be regarded as conclusive," *Consumer Products Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980). In this case the legislative materials confirm that Congress intended precisely the result stated in the text of § 8(a)(3).

(a) Section 8(a)(3) originated in § 8(3) of the Wagner Act. As of 1935, union security agreements were, by and large, lawful under state law and many unions had succeeded in securing such agreements, including "closed shop" agreements under which an employer undertakes to hire only those who already are members of the union.[14]

Senator Wagner, the author of the Wagner Act, could see "no reason why Congress should make it [the closed shop] illegal in those places where public policy now sustains it." 2 National Labor Relations Board, *Legislative History of the National Labor Relations Act* at 2335. Accordingly, Senator Wagner drafted § 8(3) in such a way as "to preserve the status quo as to the legality of closed shop agreements under the common law in the different States." *Id.* at 1353. *See also* S. Rep. No. 573, 74th Cong., 1st Sess. 11-12 (1935). Specifically, as enacted, § 8(3) contained the same prohibitory language now found in § 8(a)(3), but § 8(3) contained only one proviso which stated that "nothing in this Act . . . or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . ." The effect of this language was to neither proscribe nor affirmatively protect union security agreements but to leave the legality of such agreements solely to state law. *See Algoma Plywood Co. v. Wisconsin Board*, 336 U.S. 301 (1949).[15]

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[14] *See, Colgate Co. v. Labor Board*, 338 U.S. 355, 381-83 (1949); Dulles & Dubofsky, *Labor in America*, 28, 61, 84, 98, 106 (4th ed. 1984); n.10 *supra*.

[15] The enactment of § 8(3) did limit the availability of union security agreements, including closed shops, in two respects.

(b) In 1947, Congress returned to the subject of union security in the course of enacting the Labor-Management Relations Act of 1947 ("LMRA" or "Taft-Hartley Act"). It was through the LMRA that § 8(a)(3) took its present form.[16]

At the time the LMRA was enacted, union security agreements were lawful in all but 12 states. H.R. Rep. No. 245, 80th Cong. 1st Sess. at 34 (1947), *reprinted in* 1 National Labor Relations Board, *Legislative History of the Labor Management Relations Act of 1947*, at 325 (hereinafter cited as "LMRA Leg. Hist."). The 1947 Congress was advised by the Department of Labor that over 75% of employees working under collective agreements were in bargaining units covered by union security provisions. *See Hearings before the Senate Committee on Labor and Public Welfare on S. 55 and S.J. Res. 22*, 80th Cong. 1st Sess. 67 (1947).

The question of how to regulate union security agreements was one of the most hotly-contested issues that confronted the 1947 Congress. The legislative debate was focused on, and led to the enactment of, two new provisos to the old § 8(3) and to enactment of a new § 14(b). We therefore review the legislative materials pertaining to those provisions in particular detail.

(i) Within three months after the Eighteenth Congress convened, the House Committee on Education and Labor chaired by Representative Hartley reported out a bill, H.R. 3020, to replace the Wagner Act *in toto*. As re-

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Whereas prior to 1935 any union—including a minority union or a company-dominated union—could seek a union security agreement, a proviso to § 8(3) allowed only unions that are majority representatives to sign such agreements and only if such unions are not employer-dominated.

[16] The statement in text requires one qualification. As enacted in 1947, the LMRA permitted union security agreements only when authorized by majority vote of the affected employees in an election conducted by the NLRB. That requirement was repealed four years later. *See* 61 Stat. 601.

ported—and as passed by the House—that bill contained several provisions of relevance here.

First, and most important, through its prohibition of discrimination on the basis of union membership and the exceptions created to that prohibition, the Hartley bill would have prohibited closed shop agreements but allowed union shop agreements under which all employees in an organized bargaining unit could be required to "tender[] . . . the initiation fees and dues regularly imposed as a condition of membership." H.R. 3020, §§ 8(a)(3), (c)(8), (d)(4), 80th Cong., 1st Sess. (1947), *reprinted in* 1 LMRA Leg. Hist. at 51, 56-57. The House Committee's report stated:

> The bill bans the closed shop. Under carefully drawn regulations it permits an employer and a union voluntarily to enter into an agreement requiring employees to become and remain members of the union a month or more after the employer hires them or after the agreement is signed. . . . An employee may be expelled from the union and thus forced to leave his job only if the expulsion is by reason *of his failing to pay fees and dues imposed upon employees generally.* [H.R. Rep. No. 245, 80th Cong., 1st Sess. 9 (1947), *reprinted in* 1 LMRA Leg. Hist. at 300; emphasis added].

Second, the Hartley bill sought to regulate the practices of unions in fixing dues and initiation fees. Section 7(b) of that bill guaranteed union members the "right to be free from unreasonable or discriminatory financial demands of such organizations." 1 LMRA Leg. Hist. at 176. And § 8(c) of the bill—the "bill of rights for union members," H.R. Rep. No. 245, *supra*, at 31, 2 LMRA Leg. Hist. at 322—made it an unfair labor practice for a union

> to impose initiation fees in amounts in excess of $25 per member unless the Board shall find that initiation fees greater than that amount are reasonable

> under the circumstances; or to impose any dues or general or special assessments that are not uniform upon the same class of members, or are in excess of such reasonable amounts as the members thereof . . . by a majority of those voting, after due notice to the membership, shall authorize. [H.R. 3020, *supra*, § 8(c)(2), 1 LMRA Leg. Hist. at 53].

The Committee report stated:

> [S]ection 8(c)(2) requires that fees, dues, and assessments be reasonable and uniform, as well as authorized by the members. . . . What is reasonable will depend upon the size of the organization, the wage rates of its members, the benefits it confers, the stability of membership and of employment in the trades and industries in which the members work and other relevant factors. [H.R. Rep. 245, *supra*, at 31, 1 LMRA Leg. Hist. at 322].

Third, the Hartley bill incorporated one restriction on the manner in which unions could expend their funds: the bill prohibited unions (and corporations) from making contributions to or expenditures on behalf of candidates for federal office. H.R. 3020, *supra*, § 304, 1 LMRA Leg. Hist. at 97-98. A similar prohibition on union contributions to federal candidates had been enacted by Congress on a temporary basis as part of the War Labor Disputes Act of 1943, 57 Stat. 167. The Hartley bill proposed to expand that provision and to make it permanent. *See* H.R. Rep. No. 245, *supra*, at 46, 1 LMRA Leg. Hist. at 337.

During the House debate over the Hartley bill, Representative Hoffman moved to strike those portions of the bill allowing union shop agrements and thereby to prohibit as a matter of federal law all forms of union security. *See* 1 LMRA Leg. Hist. at 732-33. That amendment prompted supporters of the Committee's bill to explain the theory of its union security provisions. For example, Representative Buck, a member of the House Labor Committee, opposed the amendment in the following terms:

> There are millions of workmen in this country today who are working under union-shop conditions. I dare say they are the majority of all employees in this country working under union contract.
>
> Let me outline again just what a union shop is. A man applies for work with a particular employer. . . . The employer takes him. Within 30 days the man joins the union. What is his obligation from then on? *He only has two obligations: No. 1, to pay the initiation fee which is regulated under the bill, and No. 2, to pay his dues. . . .*
>
> Mr. Chairman, if this amendment is agreed to we upset countless contracts in this country under which millions of men are working on union terms satisfactory to the men and satisfactory to the employer. [1 LMRA Leg. Hist. at 736-37; emphasis added].

Similarly, Representative Jenkins opposed the Hoffman amendment on the following ground:

> If you get a majority of the workmen in a plant who agree with the management of the plant that they want a union, why should they not have it? Many of the men of the minority of the employees, whether it be 49 percent or 30 percent or 15 percent, would get the benefit of that contract made between the majority of their fellow workmen and the management. *It seems to me that it is not unreasonable that they should go along and contribute dues like the others.* [1 *Id.* at 740].

After brief additional debate, the Hoffman amendment was defeated by voice vote. 1 *Id.* at 747. On April 17, 1947 the House approved the Hartley bill without changing any of the provisions relevant here. *See* 1 *Id.* at 158-225, 861-63. That same day, the Senate Labor and Public Welfare Committee, chaired by Senator Taft, reported out the Taft bill. *See* S. 1126, 80th Cong., 1st Sess. (1947), 1 LMRA Leg. Hist. at 99-157.

(ii) Like its House counterpart, the Senate Committee decided to amend the Wagner Act to prohibit closed shop

agreements, but not to outlaw other forms of union security. The Committee explained:

> We have felt on the record before us the abuses of the system have become too serious and numerous to justify permitting present laws to remain unchanged. It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated.
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> * * *
>
> Under the amendments which the committee recommends, employers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired . . . *But in order to safeguard the rights of employees . . . membership in the union must be available to an employee on the same terms and conditions generally applicable to other members* . . . [S. Rep. No. 105, 80th Cong. 1st Sess. 6-7 (1947), 1 LMRA Leg. Hist. at 412-13; emphasis added].

The Committee added:

> The tests provided by the amendment [for determining whether an employee could lawfully be discharged] are based upon facts readily ascertainable and do not require the employer to inquire into the internal affairs of the union. [*Id.* at 20, 1 LMRA Leg. Hist. at 426].

The Senate Committee elected not to otherwise regulate union financial practices or, indeed, any other aspect of internal union affairs. The Committee stated:

> In the course of its deliberations, the committee considered many other proposals, such as . . . the formulation of a code of rights for individual members of trade unions . . . In excluding these matters from the purview of the committee, the majority of the committee should not be understood as regarding such proposals as unsound or unworkable, but rather that the problems involved should receive more ex-

> tended study by a special joint congressional committee for which the committee bill specifically provides. In other words, the committee in this bill attempted to embody reforms which are long overdue and with respect to which the record of the hearings revealed widespread agreement on the part of informed and impartial persons. [S. Rep. No. 105, *supra*, at 2, 1 LMRA Leg. Hist. at 408].

On the floor of the Senate, Senator Taft played the principal role in explicating the theory and import of the Committee's proposal with respect to union security. In his opening statement introducing the bill Senator Taft stated:

> Mr. President, I have hesitated to support the complete outlawing of the union shop because the union shop has been in force in many industries for many years and to upset it today probably would destroy relationships of long standing and probably would bring on more strikes than it would cure. I think there are abuses . . . With respect to abuses . . . we have attempted to deal with them by [the Committee's amendments]. [2 *Id.* at 1010].

Senator Taft went on to identify the "abuses" to which the Committee's bill was addressed. To begin with, Taft argued, the closed shop was in and of itself an abuse because "[s]uch an arrangement gives the union tremendous power over the employees" and "abolishes a free labor market," *id;* Taft observed that the Committee had dealt with this "abuse" by "abolish[ing] the closed shop," *id.*

Senator Taft also noted that where there is an unrestricted union shop a union is able, through the exercise of its power to decide who to admit to or expel from membership, to effect 'the complete exclusion from an[] industry of a man who wants to work in that industry and whom the employer wants to employ, and who is perfectly competent to work there." *Id.* Senator Taft explained that the Labor Committee had addressed this situation by

> propos[ing] a proviso in the case where a man is refused admittance to a union . . . It is provided that in such case the employer shall not be compelled to discharge the man simply because the union will not let him join the union on the same terms and conditions as any other member. . . .
>
> . . . *The employee has to pay the union dues.* But . . . if the union discriminates against him and fires him from the union, the employer shall not be required to fire him from the job. [*Id.*; emphasis added].[17]

Senator Taft elaborated on the practical effect of the Committee's proposal later in the debates in a lengthy colloquy with Senator Pepper with respect to the union security issue. Senator Taft there stated:

> The comittee . . . felt that if it permitted a union shop agreement which provided that every man must be a member of the union, the union must be reasonable, must accept as members all who apply for membership, and must accept them on the same term as it applies to other members, and must permit

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[17] Senator Ellender, a member of the Senate Labor Committee, gave concrete illustrations of the "abuse" to which Senator Taft referred, noting a case (involving one McGrath) in which an individual was "kicked out of the union, which meant the loss of his job" because the individual "was called in court to testify in regard to a fight which occurred between a union member and a foreman," and another case (involving Cecil B. DeMille) in which an individual was expelled and barred from working because he refused to pay a special "assessment" to the union. 2 LMRA Leg. Hist. at 1061-62. Senator Ellender explained how the Committee bill would prevent such situations from arising:

> In order to protect the employees, a union cannot cause the discharge of any of its members simply because it wants to blackball them such as in the DeMille or in the McGrath case. The union may still expel a man but so far as the employer is concerned he does not have to fire that man *so long as that employee pays his dues to the union.* I think this provision is bound to prevent such abuses as I discussed a while ago. [*Id.* at 1068; emphasis added].

them to remain in the union *if they are willing to pay their dues.*

* * *

. . . *If the employee is willing to pay his dues to the union,* the union cannot compel the employer to fire him because he is no longer a member of the union . . .

* * *

. . . [W]here [the union shop] is permitted, the unions should be required to let all employees join the union and continue to be members of the union so long *as they continue to pay their dues.* [2 *Id.* at 1096-97; emphasis added].

When Senator Pepper claimed that under the Committee bill, a union which negotiated a union security agreement would have to admit all applicants for membership, Senator Taft responded:

I did not say that. The union could refuse membership; *but if* [*the applicant*] *were willing to enter the union and pay the same dues as other members of the union, he could not be fired from his job because the union refused to take him.* [2 *Id.* at 1141-42; emphasis added].

Senator Taft reiterated these points in arguing against an amendment offered by Senator Ball to proscribe all forms of union security agreements. *See* 2 *Id.* at 1418. Senator Taft again stated the basic theory of the Committee's union-security provisions: that it was unwise to outlaw union security agreements altogether "since there had been for such a long time so many union shops in the United States [and] so since in many trades it was entirely customary and had worked satisfactorily," and that therefore the appropriate approach was to "meet the problem of dealing with the abuses which had appeared." 2 *Id.* at 1420. Senator Taft added:

In this bill we are trying to be strictly practical and to meet the actual problem which have arisen, *and not go into the broader fields of the rights of particular persons.* [2 *Id.* at 1421; emphasis added].

Senator Taft went on once again to identify the "abuses" or "actual problems" that had arisen under the Wagner Act's union-security provision: namely the existence of closed shops which destroy "freedom of labor" and the existence of "arbitrary rules on the part of unions" which were used to foreclose certain individuals from securing employment. 2 *Id.* at 1420-21. In so doing Senator Taft reiterated the Labor Committee's solution to these "abuses":

> Under our provision in the committee bill, the closed shop is abolished, and a man can get a job with an employer and continue in that job if, in effect, he joins the union *and pays the union dues.* [*Id.*; emphasis added].

Senator Taft added:

> The great difference [between the closed shop and the union shop] is that [under the union shop] in the first instance a man can get a job without joining the union or asking favors of the union . . . *The fact that the employee will have to pay dues to the union seems to me to be much less important. The important thing is that the man will have the job.* [2 *Id.* at 1422; emphasis added].

And of special significance to the issues posed here, Senator Taft continued:

> Mr. President, while I think of it, I should like to say that the rule adopted by the committee is substantially the rule now in effect in Canada. Apparently by a decision of the justices of the Supreme Court of Canada in an arbitration case, the present rule in Canada is that there can be a closed shop or a union shop, and the union does not have to admit an employee who applies for union membership, but the employee must, nevertheless pay dues, even though he does not join the union.
>
> If he pays the dues without joining the union, he has the right to be employed. [2 *Id.* at 1422].

The case referred to in this passage was *Ford Motor Co. of Canada*, 1 BNA Arb. Rep. 439, 17 LRRM 2783 (1946), under which nonmembers covered by a union security provision are required to pay an amount equal to membership dues, but are not required to pay special assessments. The arbitrator in that case, Justice I. C. Rand of the Canadian Supreme Court, reasoned that requiring all employees to pay union dues is just because a union provides "security to the body of employees" and dues represent the amount "members are satisfied to pay for substantially the same benefits." 1 BNA Lab. Arb. at 444.

The Ball amendment eventually was defeated, 2 LMRA Leg. Hist. at 1428, and the Taft bill, with the union security provisions developed by the Labor Committee, was approved by the Senate, 2 *id.* at 1522.

(iii) The Hartley and Taft bills were referred to a conference committee which crafted the union-security provisions enacted as part of the LMRA.

Because both the House and the Senate had acted to proscribe closed shops but to permit union shops, the conference committee had no difficulty in so agreeing as well. Nor did the conference committee face any disagreement with respect to adding § 14(b) to the law to expressly preserve the states' authority to regulate union security agreements, since both the House and the Senate had proceeded on the premise that these matters would continue to be subject to state regulation. And the conferees likewise easily agreed to place a limitation on those union security agreements which would be permitted under the Act so as to preclude such agreements from being used to procure the discharge of an individual who agreed to pay union dues. The conference report stated:

> As a protection to the individual worker against arbitrary action by the union, it is further provided that an employer is not justified in discriminating against an employee with respect to whom the em-

> ployer has reason to believe membership in the union was not available on *the same terms as those generally applicable to other members*, or with respect to whom the employer has reasons to believe membership was denied or terminated for reasons other than failure of the employee to tender the periodic dues and the initiation fees *uniformly required as a condition of acquiring or retaining membership.* [H.R. Rep. No. 510, 80th Cong., 1st Sess. 41 (1947), 1 LMRA Leg. Hist. at 545 (emphasis added)].

While on all these points the House and Senate bills were in accord, the conference committee did confront disagreements with respect to those provisions in the House bill which made it unlawful for a union to charge "unreasonable" dues or initiation fees and which prohibited unions from making contributions to or expenditures on behalf of candidates for federal office, as the Senate bill had no counterparts to either provision. The conference resolved this disagreement as follows.

First, "with little apparent discussion or opposition," *Pipefitters v. United States*, 407 U.S. 385, 405 (1972), the conferees adopted (in LMRA § 304) the Hartley bill's prohibition limiting what unions may spend from dues money on federal elections. That provision was codified in Ttitle 18 of the United States Code as a criminal provision and was later superseded by the Federal Election Campaign Act of 1976, Title II § 201(a), 90 Stat. 496.[18]

Second, the conferees decided to drop the House's "bill of rights" in its entirety, including the provision regulation to the amount of dues a union could charge.[19] In lieu of the latter provision, the conference committee

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[18] The FECA creates an administrative procedure, *see* 2 U.S.C. § 437, to enforce its prohibition on union political expenditures, 2 U.S.C. § 441b.

[19] *See NLRB v. Financial Institution Employees*, —— U.S. ——, 54 L.W. 4203, 4207 n.11 (Feb. 26, 1986).

crafted a new section, enacted as § 8(b)(5), which makes it unlawful for a union which negotiates a union security agreement to require "as a condition precedent to becoming a member . . . a fee in an amount which the Board finds excessive or discriminatory under all the circumstances."

In a statement describing the conference agreement on this point, Senator Taft explained the provision as follows:

> In the House bill union initiation fees were among 10 provisions providing for certain rights and immunities of members of labor organizations against arbitrary action by the officers of a union to which they belonged. This was the so-called bill of rights subsection in the House bill. The Senate conferees refused to agree to the inclusion of this subsection in the conference agreement since they felt that it was unwise to authorize an agency of the Government to undertake such elaborate policing of the internal affairs of unions as this section contemplated without further study of the structure of unions. In the opinion of the Senate conferees the language which protected an employee from losing his job if a union expelled him for some reason other than nonpayment of dues and initiation fees, uniformly required of all members, was considered sufficient protection. . . . [T]he House group did point out, however, that . . . the Senate amendment did not sufficiently deal with the situation in which unions wishing to constitute a monopoly of certain trades might pass a resolution requiring all new members to pay exorbitant initiation fees and thereby frustrate the intent of the Senate bill. The House bill limited initiation fees to $25 per member except where a greater amount was permitted by the Board. The Senate conferees were of the opinion that it was not practical to set a definite amount of law but were willing to accept the principle that where employment was conditioned upon membership in a labor organization

> exorbitant initiation fees should not be charged. [2 LMRA Leg. Hist. at 1540].[20]

In a suplemental statement responding to charges that § 8(b)(5) was unduly intrusive on internal union affairs, Senator Taft stressed that this provision "*is limited to initiation fees and does not cover dues.*" 2 *Id.* at 1623; emphasis added.

(c) The legislative materials just reviewed establish that in enacting § 8(a)(3) Congress meant what the plain words of that section so clearly state: the NLRA leaves employers and unions free to adopt and enforce union security agreements requiring all employees in a bargaining unit to pay an amount equal to union dues without regard to whether a particular employee objects to the uses the union makes of its monies. Three aspects of the legislative history compel this conclusion.

First, and most importantly, the debates in Congress with respect to § 8(a)(3) itself leave no doubt that this is what Congress understood and intended. Those debates show that in crafting the proviso to § 8(a)(3) Congress was attempting "only to 'remedy the most serious abuses of compulsory union membership . . .'" *NLRB v. General Motors Corp., supra*, 373 U.S. at 741. The particular "abuses" Congress identified and attempted to correct were the closed shop and those union shops in which unions were free to arbitrarily or discriminatorily deny membership to a particular individual and then compel

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[20] *See also* H.R. Rep. No. 510, *supra*, at 46, 1 LMRA Leg. Hist. at 550 (statement of House conferees):

> Section 8(c) of the House bill contained detailed provisions dealing with the relations of labor organizations with their members. One of the more important provisions of this section—that limiting the initiation fees which a labor organization may impose where a permitted union shop or maintenance of membership agreement is in effect—is included in the conference agreement (sec. 8(b)(5)) . . . The other parts of this subsection are omitted from the conference agreement as unfair labor practices . . .

the discharge of that individual because of his nonmembership. *See* pp. 30-31, 33 *supra*. Congress' solution to these problems was to ban the closed shop and to adopt the "Rand formula," pp. 33-34 *supra*, permitting the enforcement of union shop agreements only to the extent that membership was available "*on the same terms*" to all bargaining-unit employees, Congress was of the view that, as Senator Taft stated, "[t]he fact that the employee will have to pay dues to the union seems to be to be much less important." P. 33 *supra*. Thus, far from creating special privileges for employees covered by union security agreements who object to particular union expenditures to pay less than full union dues, the entire thrust of Congress' effort in 1947 was to assure that each such employee would "contribute dues like the others," p. 28 *supra* (Rep. Jenkins), or, as Senator Taft put it, that each employee would "pay the same dues as other members of the union," p. 32 *supra*.

Second, the legislative materials show that in enacting the provisions just described, Congress decided "not to go into the broader fields of the rights of particular persons," p. 32, *supra* (Sen. Taft), and more particularly not to regulate the internal decisions of unions with respect to the level of their dues. The Senate Labor Committee noted early on in the evolution of the LMRA that any limitation on the circumstances in which a nonmember could be discharged pursuant to a union security agreement must be "based on facts readily ascertainable and . . . not require the employer to inquire into the internal affairs of the union." P. 29 *supra*. And the Senate conferees refused to accept the House's bill of rights provision which would have proscribed "unreasonable" dues (and, thus, would have forbidden the discharge of an employee who refused to pay dues found to be "unreasonable").[21] Pp. 35-36.

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[21] The Senate conferees' caution in these regards reflected the fact that in developing the LMRA Congress faced a "predictable

Third, the legislative history shows that in enacting the LMRA Congress placed one, and only one, limitation on the uses which can be made of union dues: Congress continued (and expanded) the previously enacted prohibition on the use of dues money for making contributions to federal candidates. P. 35 *supra*. The fact that the 1947 Congress deemed it necessary to enact a specific provision to thus protect union members from having their dues payment used against their will for certain political purposes makes it clear that Congress did not believe that § 8(a)(3) itself prohibited such expenditures or granted objectors a right to refuse to fund activities to which they object.

In sum, as the Solicitor General and NLRB conclude in their brief *amicus curiae*:

> The legislative history of Taft-Hartley cannot be reconciled with the argument that the statute . . . precludes an employer and a union from agreeing to require both union member and non-union member employees to pay uniform fees that the union may use for both collective bargaining purposes and non-collective bargaining purposes. In 1947, Congress was principally concerned with insulating workers' jobs from capricious actions by union leaders . . . But it rejected proposals to place general federal restrictions on either the dues equivalents that employees may be required to pay or the uses to which unions may put such dues-equivalents. Rather, though it was well aware that union dues are used for "a variety of purposes in addition to meeting the union's costs of collective bargaining" (*Retail Clerks v. Schermberhorn*, 373 U.S. [746,] 754), Congress

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presidential veto," *Pipefitters v. United States*, *supra*, 407 U.S. at 409, as President Truman the prior year had vetoed the Case bill, the "direct antecedent" of the LMRA, *Doud Box Co. v. Courtney*, 368 U.S. 502, 509 (1967). The conferees therefore sought to frame a measure which could gain sufficient support to override such a veto. *See* 1 Leg. Hist. at 882, 883-84 (Rep. Hartley).

only banned unions from using union security provisions to exact more than the initiation fees and "periodic dues" uniformly required as conditions of union membership. Otherwise, it determined that the regulation of union security agreements should be left to specific federal legislation and to the legislatures and courts of the several states. [U.S. Br. at 18-20].

3. *The Asserted Analogy to the Railway Labor Act.*

As previously noted, in *Machinists v. Street*, *supra*, this Court concluded that § 2, Eleventh of the RLA "is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes." 367 U.S. at 768. The panel majority—and, presumably, the three other judges on the *en banc* court who, without explanation, sided with the panel majority—relied heavily on *Street* in concluding that NLRA § 8(a)(3) contains an identical prohibition. For two reasons, however, this reliance on *Street* is misplaced.

First, *Street* was decided in the light of *Hanson*'s holding that the government is implicated in union security agreements negotiated in industries regulated by the RLA and that therefore a challenge to such an agreement raised "justiciable questions under the First and Fifth Amendments," *Hanson*, 351 U.S. at 231. Given *Hanson*'s holding, the Court in *Street* correctly began its analysis from the premise that if RLA § 2, Eleventh were held to authorize union security agreements which require each employee to contribute to all activities of the union, including political or ideological activities to which the employee objects, constitutional "questions of the utmost gravity" would be presented. *Street*, 367 U.S. at 749. Mindful of the "restraints against unnecessary constitutional decisions," the Court in *Street* thus sought to " 'ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' " *Id.* In other words, as Justice Stewart (who joined the Court's opinion in *Street*) later stated in his opinion for the

Court in *Abood*, the *Street* Court "embraced an interpretation of [§ 2, Eleventh of] of the Railway Labor Act not without its difficulties precisely to avoid facing the constitutional issues presented." 431 U.S. at 232.

In the NLRA context, in contrast, as we have seen, pp. 12-20, *supra*, there is no basis for attributing to the government a union security agreement negotiated by private parties who are subject to state law in this regard. That being so, there are no constitutional issues lurking here and no need to reach for an interpretation of NLRA § 8(a)(3) analogous to the "possibl[e]" construction of the RLA that *Street* embraced notwithstanding the "difficulties" of that construction. For that reason alone, *Street* does not guide the construction of NLRA § 8(a)(3).

Moreover, the considerations that enabled the *Street* Court to conclude that it is " 'fairly possible' " to read RLA § 2, Eleventh to proscribe union security agreements requiring uniform payments from all bargaining-unit employees are wholly absent with respect to NLRA § 8(a)(3).

Street stressed the fact that from 1926, when the RLA was first enacted, until 1951 when § 2 Eleventh assumed its present form, that Act *prohibited all forms of union security* and declared a "policy of complete freedom of choice of employees to join or not to join a union." 367 U.S. at 750. Given that background, the Court was persuaded that it was at least possible to conclude that when Congress amended the RLA in 1951 to permit union security agreements, "Congress did not completely abandon the policy of full freedom of choice embodied in the . . . Act but rather made inroads on it for the limited purpose of eliminating the problems created by the 'free rider.' " *Id.* at 767.

In all relevant respects the legislative history of NLRA § 8(a)(3) is the opposite of the history of RLA § 2, Eleventh, and the lessons to be drawn from the NLRA are

also the opposite of the lesson drawn in *Street*. As we have seen, the original policy of the Wagner Act was to *permit all forms of union security agreement* (including even closed shops), and such agreements were a commonplace in 1947, when NLRA § 8(a)(3) took its present form. Thus, in enacting the LMRA Congress was not making "inroads" on a policy of "full freedom of choice" in order to respond to a specific problem facing unions; rather the 1947 amendments to NLRA § 8(a)(3) were designed to make an inroad into a preexisting policy of the *absolute freedom of private parties under federal law to negotiate union security agreements*. And just as the "inroad" Congress made in 1951 in the RLA "full freedom of choice" policy was for a "limited purpose" of addressing a particular "problem[]" so, too, the "inroad" Congress made in 1947 in the NLRA policy of private freedom in collective bargaining was a "limited" one to respond to carefully-defined "abuses" that Congress concluded had arisen in the union security agreements permitted by the Wagner Act.

Because there is no evidence that Congress conceived of agreements requiring uniform dues payments by all bargaining-unit employees as an "abuse"—indeed, because the legislative materials demonstrate that Congress viewed such agreements as the *solution* to the union security controversy—NLRA § 8(a)(3) cannot plausibly be read as was RLA § 2, Eleventh to permit only limited forms of union security.

Once again, the brief of the United States makes the point well: "the premises on which the *Street* Court rested its interpretation of Section 2, Eleventh are missing in the context of the NLRA." U.S. Br. at 21. Whereas "the *Street* Court believed that it was acting in the shadow of a serious First Amendment question," there is "no comparable First Amendment question in the context of the NLRA." *Id.* at 21-22. And while "the *Street* Court's interpretation of Section 2, Eleventh was

influenced by the 'open shop' history of the railway industry," in "industries covered by the NLRA the history of union security agreements was quite different" and thus "the historical considerations that underlay the *Street* decision point in a quite different direction than does the history of the NLRA." *Id.* at 22-23. *See also* Pet. App. at 91a-97a (Winter, C.J., dissenting).

In sum, nothing in the RLA or in *Street* suffices to overturn the conclusion which the NLRA's language and history unmistakably compel: Congress decided to permit unions and employees in industries regulated by the NLRA to enter and enforce union security agreements requiring all bargaining unit employees to pay an amount equal to union dues.

C. The Lessons.

What remains is to apply the lesson of the foregoing state action and NLRA analysis to the specific claims made by plaintiffs here over which the federal courts have jurisdiction.

(1) That plaintiffs' First Amendment claim fails in the absence of state action is self-evident. "It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgement by government." *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976). *See also Rendell-Baker v. Kohn, supra*, 457 U.S. at 837. Because the collective bargaining agreement here which conditions continued employment on the payment of an amount equal to union dues is not attributable to the government, that agreement cannot violate the First Amendment.

(2) Similarly, our showing that in enacting the LMRA Congress expressly decided that federal law should not invalidate union security agreements requiring payment of union dues by all bargaining unit employees is necessarily dispositive of plaintiffs' fair-representation claim.

This Court has made clear that the duty of fair representation is a "statutory duty," *Vaca v. Sipes*, *supra*, 386 U.S. at 177, that is "implicit in the National Labor Relations Act," *Electrical Workers v. Foust*, *supra*, 442 U.S. at 46-47 n.8. *See also Del Costello v. Teamsters*, *supra*, 462 U.S. at 164 n.14. That being so, Congress' decision to allow parties covered by the NLRA to enter into union security agreements of the type involved here must be controlling in defining the parameters of the duty of fair representation that has been derived from the Act. Simply stated, it would be contrary to every rule of statutory construction to conclude that the very form of union security agreements that Congress decided to allow in enacting § 8(a)(3) is nonetheless violative of a duty implied from the statute of which § 8(a)(3) is a part.

The language of § 8(a)(3) makes this crystal clear and bears quoting again. After condemning in general terms discrimination on the basis of union membership, the section goes on to provide that "*nothing in this Act, or in any other statute of the United States* shall preclude an employer from making" a union security agreement allowed by the section (emphasis added). Thus, by its very terms § 8(a)(3) states that the permissions contained in the provisos to that section supersede any prohibition that might somehow be contained elsewhere in the Act. Given this explicit and unambiguous language, plaintiffs' effort to convert the duty of fair representation into a prohibition on conduct Congress decided to allow in enacting § 8(a)(3) must fail.[22]

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[22] Without treating § 8(a)(3)'s express language, Judge Murnaghan concluded that the limits Congress placed on the reach of § 8(a)(3)'s prohibitions are not determinative of the scope of the duty of fair representation. *See* Pet. App. 18a-21a (concurring opinion). In this regard, Judge Murnaghan made two points, neither of which bears scrutiny.

First, Judge Murnaghan argued that although "both the drafters of the House bill and Senator Taft endorsed the union shop" that

(3) There is a second and independent reason why plaintiffs' fair-representation claim must be rejected: even without the guidance provided by § 8(a)(3) and its legislative history, there would be no basis for concluding that a union violates the duty of fair-representation by negotiating a union security agreement requiring all members of a bargaining unit to pay an equal amount of union dues, or by expending such dues on activities "beyond that allocable to collective bargaining, or contract administration, or grievance adjustments," p. 2, *supra*.

(a) As previously noted, a "breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, *supra*, 386 U.S. at 190. Plainly here the union has not acted in a "*discriminatory*" fashion; to the contrary, as

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fact has "no bearing on agency shops or agency fees." Pet. App. 20a n.14. But this misses the essential point that the statute, in terms and in its intent, contemplates *at a minimum* that all employees may be required to pay union dues. Indeed, under *NLRB v. General Motors*, *supra*, that is the *only* obligation that may be imposed on objecting employees. Senator Taft made explicit that such an obligation could be placed on nonmembers, stating that Congress was adopting the Canadian "Rand formula" under which employees cannot be required to join a union but can be compelled to pay dues. Thus, while Senator Taft did not use the term "agency shop" the words he used embrace that form of union security.

Second, Judge Murnaghan asserted that the only inference to be drawn from the rejection of the House's bill of rights is

> merely that Congress chose not to restrict unions' expenditures of employees' funds through the use of unfair labor practice provisions. Nothing in the legislative history indicates that Congress intended to preclude the development of such restrictions by the court under the principles of the duty of fair representation. [Pet. App. 19a]

But the legislative materials set forth at pp. 23-40, *supra* show that the Senate rejected the House's bill in order to avoid governmental "policing of the internal affairs of the union." There is simply no basis for the theory that Congress viewed *judicial* oversight of union dues and expenditures more favorably than oversight by the NLRA.

the Second Circuit observed in an indistinguishable case, the plaintiffs' "contention is that, in this instance, they *should* be treated differently because they disagree with the views of those who joined the union voluntarily rather than under the compulsion of the union security clause." *Price v. Auto Workers*, *supra*, 795 F.2d at 1136 (emphasis in original). Nor is there any basis for believing—let alone any factual finding by the courts below—that the union was animated by "*bad faith*" in insisting that all persons represented by the union pay an equal amount to the union, or by using the funds thus collected to engage in the range of activities "regularly engaged in by modern unions," *id.*, including activities that are not strictly part of the union's role as bargaining representative narrowly defined. Thus, the only basis on which a union could be found to have breached its duty of fair representation here would be on the theory that it is "arbitrary" of the Union not to permit objectors to pay less than full union dues, or to use dues money—at least of objectors—to engage in activity beyond the realm of collective bargaining narrowly defined. Such a theory cannot withstand analysis.

(b) Requiring all persons represented by a union within a bargaining unit to pay the same amount to the union is an entirely rational, non-arbitrary course for a union to take. A union represents—indeed must represent—all employees within the bargaining unit, and the union's accomplishments necessarily redound to the benefit of all members of the unit; that is true not only of gains achieved by a union in negotiating and administering collective bargaining agreements but also of gains achieved by the union through other means of furthering the represented workers' employment interests. It is therefore surely fair and rationale to require all members of the bargaining unit to contribute equally to the support of the union.

Furthermore, establishing a uniform dues level for all bargaining-unit members prevents the friction among

employees that otherwise can arise within a bargaining unit if some employees pay less in union dues than others and avoids the substantial expense entailed in determining each year what portion of the union's expenditures are devoted to activities germane to the union's role as exclusive representative and what portion goes for other activities. The costs of making these calculations are discussed in detail in the brief for the AFL-CIO as *amicus curiae* in this case; for present purposes it suffices to note that it is hardly arbitrary for a union to decline to maintain the records and perform the analyses necessary to make such calculations each year and instead to decide to charge each employee in the bargaining unit the same amount.

(c) Nor is there any basis for concluding that a union breaches its duty of fair representation by expending dues money for activities beyond direct collective bargaining narrowly defined. Unions, after all, exist to advance the employment interests of the workers the union represent, and those interests can be advanced away from the bargaining table as well as at the table. Unions thus act in accordance with their *raison d'etre* when, *e.g.*, they turn to the legislative arena or the judicial arena to further the interests of workers, or when they seek to forge alliances with labor unions in other countries, or with other groups in this country who share common concerns. As Judge Cardamone observed for the Second Circuit in *Price*, these are "activities regularly engaged in by modern unions." 795 F.2d at 1136.

Indeed, a union's decision to expend resources in this way—or in any other way for that matter—does not even implicate, let alone offend, fair-representation concerns. As the late Judge Tamm explained in his opinion for the court in *Kolinske v. Lubbers*, 712 F.2d 471, 481 (D.C. Cir. 1983), dismissing a fair-representation challenge to a union's refusal to pay strike benefits to persons not actively participating in a strike:

> Arising as it does out of a union's privilege under section 9(a) of the NLRA to serve as the employee's exclusive representative, the duty of fair representation is co-extensive only with the power of exclusive representation. As we have earlier noted, "a union . . . can be held to represent employees *unfairly* only in regard to those matters as to which it represents them at all—namely, "rates of pay, wages, hours . . . , or other conditions of employment." In other words, the duty of fair representation extends only to matters involving an employee's dealings with his employer and ordinarily does not affect an employee's relationship with the union structure. [712 F.2d at 481; citations omitted; emphasis in original; *see also* Pet. App. 24a (Winter, C.J., dissenting); *Price Auto Works*, *supra*, 795 F.2d at 1136].

In sum, neither the collection of uniform dues from all employees in the bargaining unit nor the expenditure of such monies on activities other than direct collective bargaining narrowly defined constitutes arbitrary, discriminatory, or bad faith conduct. Thus, even if Congress had not specially decided that such conduct is not contrary to the NLRA, there would be no basis for holding that such activity breaches the duty of fair representation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the case remanded with instructions to direct the district court to dismiss plaintiffs' complaint.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTORY AND CONSTITUTIONAL PROVISIONS

Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(3) provides as follows:

> It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude any employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally

applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), provides in pertinent part as follows:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a suit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment;

Section 14(b) of the National Labor Relations Act, 29 U.S.C. § 164(b), provides in pertinent part as follows:

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152, Eleventh, provides in pertinent part as follows:

> Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days fol-

lowing the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

The First Amendment to the United States Constitution provides in pertinent part as follows:

Congress shall make no law abridging the freedom of speech.

No. 86-637

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMUNICATIONS WORKERS OF AMERICA and
ITS LOCALS 2100, 2101, 2108, and 2110,

Petitioners,

v.

HARRY E. BECK, JR., *et alia*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

I. Do Sections 8(a)(3) and 9(a) of the National Labor Relations Act preclude a union from conditioning the employment of nonunion employees upon the latters' payment of a fee greater than their *pro rata* share of the costs the union incurs in the performance of its statutory duties as the employees' exclusive representative for the purposes of "collective bargaining" as defined in the Act; or, if Sections 8(a)(3) and 9(a) do not so limit a union, are they *pro tanto* unconstitutional under the First and Fifth Amendments to the Constitution of the United States?

II. If Sections 8(a)(3) and 9(a) of the National Labor Relations Act do preclude a union from conditioning the employment of nonunion employees upon the latters' payment of a fee greater than their *pro rata* share of the costs the union incurs in the performance of its statutory duties as the employees' exclusive representative for the purposes of "collective bargaining" as defined in the Act, is an alleged violation of those sections within the "primary jurisdiction" of the National Labor Relations Board as an "unfair labor practice", under the doctrine of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), or within the concurrent jurisdiction of the national courts?

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A. The agreement negotiated by CWA under color of the provisos to Section 8(a)(3) is subject to constitutional scrutiny as the product of "governmental action" because Sections 9(a) and 8(a)(3) clothe CWA with the *quasi*-legislative status of the Employees' exclusive representative and empower it to condition their employment upon the payment of "dues" and "fees" 4

B. Irrespective of the "governmental action" infusing them, Sections 8(a)(3) and 9(a) limit the "dues" and "fees" CWA may demand from the Employees to their *pro rata* share of the costs of

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C. If Sections 8(a)(3) and 9(a) do not preclude CWA from conditioning the employment of nonunion employees upon payment of the costs of "collective bargaining" only, those sections are repugnant to the First and Fifth Amendments because they license CWA to abridge the Employees' freedoms of association and speech, and confiscate portions of their wages, without any compelling governmental interest in, or even rational basis for, such abridgement and confiscation 29

II. The violation of Sections 8(a)(3) and 9(a) found in this case is not within the "primary jurisdiction" of the National Labor Relations Board, under the doctrine of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959) 37

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J. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law* (1974) 6, 48

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No. 86-637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMUNICATIONS WORKERS OF AMERICA and ITS LOCALS 2100, 2101, 2108, and 2110,

Petitioners,

v.

HARRY E. BECK, JR., *et alia*,

Respondents.

BRIEF FOR THE RESPONDENTS

Respondents Harry E. Beck, Jr., *et alia* ("the Employees") hereby submit their brief on the merits, urging affirmance of the Court of Appeals on the questions presented for review.[1]

SUMMARY OF THE ARGUMENT

I. NLRA Section 9(a) is the source of "governmental action" infusing Section 8(a)(3) and agreements negotiated thereunder. *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944), so held for the analogous provision of the RLA, Section 2, Fourth. And subsequently, the *Steele* doctrine has been applied to the NLRA in numerous of this Court's decisions. "Governmental action" aside, Sections

[1] The Employees' cross-petition in No. 86-966 contends that the remedy the Court of Appeals upheld violates the procedural requirements of *Ellis* v. *BRAC*, 466 U.S. 435 (1984), and *Chicago Teachers Union, Local No. 1* v. *Hudson*, ____ U.S. ____, 106 S. Ct. 1066 (1986). These questions are not now before the Court. However, *pace* petitioners Communications Workers of America *et alia* ("CWA"), the propriety of *any* procedures rests on the substantive interpretation of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.* and the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et. seq. Contrast* Brief for Petitioners (BP) at 3 n.2.

9(a) and 8(a)(3) deny exclusive representatives authority to condition the employment of nonunion employees on payments of "dues" or "fees" exceeding the employees' *pro rata* share of the representatives' statutory "collective-bargaining" costs under Section 8(d). This construction rests on the language, purpose, and judicial interpretation of Section 8(a)(3), and on this Court's construction of the parallel language of RLA Section 2, Eleventh in *IAM* v. *Street*, 367 U.S. 740 (1961), and later cases. And if Sections 9(a) and 8(a)(3) do license exclusive representatives to compel payment of arbitrary and unlimited amounts, they are *pro tanto* repugnant to the First and Fifth Amendments to the Constitution, perforce of *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), *National Cable Television Association, Inc.* v. *United States*, 415 U.S. 336 (1974), and numerous other decisions defining the sole legitimate basis for compulsory "fees" in a labor-relations context.

II. This case does not come within the "primary-jurisdiction" doctrine of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), because it involves a violation of the duty of fair representation; addresses the legality of agreements under Section 8(a)(3), which Congress excluded from the "primary jurisdiction" of the National Labor Relations Board; could call for arbitration as a remedy, in which event "primary jurisdiction" would not attach; and would raise serious constitutional questions should that doctrine be held applicable.

ARGUMENT

I. Sections 8(a)(3) and 9(a) of the National Labor Relations Act preclude CWA from conditioning the employment of nonunion employees on payment of more than a *pro rata* share of the costs of performing its statutory duties as their exclusive representative;

or, if they do not, Sections 8(a)(3) and 9(a) are *pro tanto* repugnant to the First and Fifth Amendments to the Constitution of the United States.

The substantive question here is tripartite: namely,

• Whether the most reasonable construction of NLRA Sections 8(a)(3) and 9(a), informed by their legislative purpose and exact parallelism to RLA Sections 2, Eleventh and 2, Fourth, is that a union may not condition the employment of nonunion employees on the latters' payment of more than their *pro rata* share of the costs the union incurs performing its statutory duties as those employees' exclusive representative for the purposes of "collective bargaining" as defined in NLRA Section 8(d).

• If such a construction is questionable, whether agreements negotiated under Section 8(a)(3) are the products of "governmental action", thereby requiring this Court to adopt that construction in order to avoid constitutional issues.[2] And,

• If such a limiting construction is not fairly plausible, whether Sections 8(a)(3) and 9(a) are repugnant to the First and Fifth Amendments to the Constitution.

The Employees show in Part I.B., *post*, that their construction of Sections 8(a)(3) and 9(a) is not open to serious question. And in Part I.C., *post*, they show that, if that construction is not adopted, Sections 8(a)(3) and 9(a) are unconstitutional.[3] But, first, they address the question of "governmental action" that CWA considers controlling.

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[2] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

[3] Revealingly, CWA never denies this—predicating its defense of those sections solely on the supposed absence of "governmental action". *See* BP at 5, 12-21.

A. The agreement negotiated by CWA under color of the provisos to Section 8(a)(3) is subject to constitutional scrutiny as the product of "governmental action" because Sections 9(a) and 8(a)(3) clothe CWA with the *quasi*-legislative status of the Employees' exclusive representative and empower it to condition their employment upon the payment of "dues" and "fees".

CWA notes that an ostensibly "private decision" is the product of "governmental action" subject to constitutional scrutiny "'only when [the government] has exercised coercive power or has provided * * * significant encouragement'" to the private actor. But then it incorrectly concludes that, "[m]easured by that test, the instant case plainly involves purely private conduct", because the government neither coerced nor encouraged CWA and the employer to make the section 8(a)(3)-agreement *sub judice* here. Rather, CWA says, the 8(a)(3)-agreement resulted from "'private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract'". That the provisos to Section 8(a)(3) "sav[e 8(a)(3)-agreements] from condemnation by that section's otherwise blanket prohibition on discrimination against nonmembers of a union" is irrelevant, says CWA, because "a statutory provision exempting certain private conduct from [a] * * * prohibition does not transform the private conduct into state action".[4]

CWA mistakenly focusses only on part of the relationship between itself and the employer, ignoring the more telling relationship—inherent in the 8(a)(3)-agreement—between itself (alone or together with the employer) on one

[4] BP at 13-14, 15. CWA refers to the arrangement *sub judice* as a "union-security agreement", a tendentious characterization absent from the NLRA. The Employees designate it neutrally as an "8(a)(3)-agreement".

side and the Employees on the other side. Viewed in its full context, the agreement is hardly "private", because CWA *is and must be a statutory Section 9(a) exclusive representative*, exercising special legal powers and privileges as against both the employer and the Employees. If the employer in some Orwellian sense makes "free" choices within a regime of *compulsory* collective bargaining with CWA,[5] the Employees exercise not even that modicum of "freedom", but must accept as an inflexible condition of employment CWA's unilateral choices regarding 8(a)(3)-agreements and all other subjects of bargaining. Thus, the coercion material to "governmental-action" analysis derives from CWA's Section 9(a) status. For that reason, "the necessarily fact-bound inquiry that confronts [this] Court" where "governmental action" is concerned requires consideration of Section 9(a).[6]

CWA concedes that NLRA unions enjoy the "status" and "authority" of exclusive representatives, but contends that: (i) the unions' license to make 8(a)(3)-agreements *pre*-existed the NLRA; and (ii) the monopolistic character of exclusive representation is insufficient to support a finding of "governmental action" in an 8(a)(3)-agreement.[7] These contentions lack merit, because: First, the *pre*-NLRA common law of employment relations recognized nothing remotely akin to exclusive representation as later embodied in the NLRA and RLA. Second, the controlling decision on the *quasi*-governmental nature of exclusive representation is not one CWA discusses, but *Steele* v. *Louisville & Nashville Railroad Co.*[8]

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[5] *See* NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5).

[6] *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982).

[7] BP at 16-21.

[8] 323 U.S. 192 (1944).

1. The legal-historical facts. Prior to the National Industrial Recovery Act in 1933,[9] the notion of an "exclusive representative" empowered by statute to control dissenting employees was foreign to American industry: Employees' exposure to majority rule by unions depended on voluntary association under common-law contract principles.[10] And common law did "not recognize the right of any association to dictate to others what contracts [should or should] not be made",[11] especially where "the most serious right affecting a laboring man's life", the right of "gaining an honest livelihood", was concerned.[12]

Although common law acknowledged that a collective bargain *might* constitute an enforceable contract, few such agreements did.[13] However, the courts did develop theories—not without their difficulties because of the mutually contradictory premisses of collective and individual bargaining—to reconcile collective agreements with individual employment contracts.[14] *But these approaches all emphasized the*

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[9] Act of 16 June 1933, ch. 90, 48 Stat. 195, *declared unconstitutional in* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). *See* J. Gross, *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law* (1974), Vol. 1, at 89-103.

[10] *E.g.*, Sargent, "Majority Rule in Collective Bargaining Under Section 7(a)", 29 *Ill. L. Rev.* 275, 278 (1934).

[11] Cooks' Union v. Papageorge, 230 S.W. 1086, 1089 (Tex. Civ. App. 1921). *Compare* Texas & N.O.R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548, 571 (1930), *with* Coppage v. Kansas, 236 U.S. 1, 14 (1915) (liberty of individual to select a representative to make employment contracts is part of his liberty to make those contracts himself).

[12] Lucke v. Clothing Cutters' Local 7,507, 77 Md. 396, 405, 26 A. 505, 507 (1893).

[13] *See* the perceptive analysis in Petro, "Civil Liberty, Syndicalism, and the NLRA", 5 *U. Toledo L. Rev.* 447 (1974).

[14] *See, e.g.*, Witmer, "Collective Labor Agreements in the Courts", 48 *Yale L.J.* 195 (1938); Rice, "Collective Labor Agreements in American Law", 44 *Harv. L. Rev.* 572 (1931).

maintenance of personal autonomy for individual employees.[15]

Some cases considered collective agreements "usages or customs" incorporated within the individual contract—*if* the employee assented to and made "no express contract in conflict" with the collective bargain.[16] Even voluntary union members were not automatically disabled from contracting autonomously because of a collective bargain their union negotiated.[17] *A fortiori*, a nonunion employee "was not bound by any of [the union's] rules" in his employment relations.[18] Because the "*real* labor contract is made between the individual employer and the individual employee", a collective arrangement was only an unenforceable "understanding"; for "[t]o enforce [a] collective contract would be to deny the individual's liberty to make his own contract".[19]

Other cases treated unions as employees' agents, securing employment conditions that "may be enforced directly by the individual".[20] However, recognizing that union decisions arise by majority rule rather than individual choice,[21] the courts generally required that a collective arrangement be "ratified by the members of the union as individuals".[22] An employee's knowledge of the collective agreement did not

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[15] *See, e.g.*, Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 250-51 (1917).

[16] Hudson v. Cincinnati, N.O. & T.P. Ry., 152 Ky. 711, 718, 154 S.W. 47, 50 (1913).

[17] *E.g.*, *id.* at 714-15, 154 S.W. at 48-49.

[18] Hanson v. Innis, 211 Mass. 301, 305, 97 N.E. 756, 757 (1912).

[19] Christiansen v. Local 680, Milk Drivers, 126 N.J.Eq. 508, 511, 10 A.2d 168, 170 (1940) (emphasis supplied).

[20] Yazoo & M.V.R.R. v. Sideboard, 161 Miss. 4, 14, 133 So. 669, 671 (1931) (enforcement by nonunion employee).

[21] On the deficiencies of this theory arising out of the political nature of union decision-making, *see* Witmer, *ante* note 14, at 226-37.

[22] Panhandle & S.F. Ry. v. Wilson, 55 S.W. 2d 216, 219 (Tex. Civ. App. 1932).

evidence ratification, unless he "voted for" or "individually participated in the making of" the arrangement.[23] Union officials "could not create * * * a binding bargain * * * unless they had been authorized * * * by the members in some form sufficient to show mutuality of will and consent".[24] For the courts viewed collective bargains as "designed primarily for the individual benefit of the members", "and not to place it within the power of the organization * * * to affect the[ir] individual rights * * * theretofore secured [by contracts incorporating] the agreement".[25]

Still other cases treated employees as "third-party beneficiaries" of collective agreements,[26] but also held that a "third-party beneficiary can not be compelled to accept or act on the contract made for his benefit".[27]

In sum, prior to 1933, a collective agreement constituted only "a mutual general offer to be closed by specific acceptances" of individual employees.[28]

Exclusive representation under NLRA Section 9(a) and RLA Section 2, Fourth radically departs from this tradition. *First*, it outlaws bargaining by individual employees. For an employer to negotiate with individuals violates "the essential principle of collective bargaining" under Section 9(a), "even though the employees consent * * * or suggest the con-

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[23] Hudson, 152 Ky. at 716, 154 S.W. at 49; West v. Baltimore & O.R.R., 103 W. Va. 417, 422, 137 S.E. 654, 655 (1927).

[24] W.A. Snow Iron Works, Inc. v. Chadwick, 227 Mass. 382, 390-91, 116 N.E. 801, 804 (1917).

[25] Piercy v. Louisville & N.R.R., 198 Ky. 477, 484-85, 248 S.W. 1042, 1045 (1923).

[26] On the inadequacies of this theory, *see* Rice, *ante* note 14, at 595-97.

[27] Huston v. Washington Wood & Coal Co., 4 Wash. 2d 449, 452-53, 103 P.2d 1095, 1097 (1940).

[28] Yazoo & M.V.R.R. v. Webb, 64 F.2d 902, 903 (5th Cir. 1933).

duct".[29] Under exclusive representation, "[i]ndividual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed" for collective bargaining, "to forestall bargaining[,] or to limit or condition the terms of the collective agreement".[30] So, in terms of common-law contractual rights, exclusive representation "extinguishes the individual's power to order his own relations with his employer and creates a power vested in the chosen representative",[31] "strip[s individual employees] of traditional forms of redress",[32] and gives unions "a thraldom over the men who designate [them]" by "creat[ing] rights in [the] unions overriding those of the employees they represent".[33] Second, exclusive representation outlaws independent action by employers. They must negotiate "in good faith" with unions over all statutory subjects of collective bargaining.[34] Specifically, because 8(a)(3)-agreements are a mandatory bargaining-subject, employers may not refuse to negotiate on, or to compromise because philosophically opposed to, them.[35] And, if employers do accept 8(a)(3)-agreements, they may not refuse to enforce them;[36] and victimized employees are powerless to prevent that enforcement.[37]

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[29] Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-84, 687 (1944).

[30] J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944) (NLRA). *Accord*, Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342, 346-47 (1944) (RLA). This alone refutes CWA's fantasy that "freedom" for the Employees exists under statutory collective bargaining because government supervises "the procedure alone". *See* BP at 13-14.

[31] NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 180 (1967).

[32] Vaca v. Sipes, 386 U.S. 171, 182 (1967).

[33] Medo Photo Supply Corp., 321 U.S. at 696, 697 (Rutledge, J., dissenting).

[34] NLRA §§ 8(a)(5), 8(d).

[35] *E.g.*, NLRB v. General Motors Corp., 373 U.S. 734 (1963); Queen Mary Restaurants Corp. v. NLRB, 560 F.2d 403, 409 (9th Cir. 1977); Preterm, Inc., 240 N.L.R.B. 654, 673 (1979).

[36] *E.g.*, Independent Stave Co., 248 N.L.R.B. 219, 220 (1980).

[37] *See* Dean v. TWA, 708 F.2d 486 (9th Cir. 1983) (RLA).

In short, to pretend (as does CWA) that Sections 9(a) and 8(a)(3) are not coercive, particularly as to the Employees, and that that coercion is not the direct, intended product of "governmental action", is laughable.

2. The* Steele *doctrine. CWA's refusal to address the seminal and still-controlling decision on the *quasi*-governmental character of exclusive representation, *Steele* v. *Louisville & Nashville Railroad Co.*,[38] reveals its awareness of the vacuity of its position.[39]

CWA's analysis of "governmental-action" precedent is disingenuous. First, it disposes of the one *labor-relations* case it cites, this Court's 1956 decision in *Hanson*,[40] by saying that "the critical element of the state action ruling in *Hanson* is absent here." Then, it cites certain *post*-1974 *non-labor* cases and says that, because *Hanson* does not apply, these cases control.[41] It does not acknowledge, however, that, as *Hanson* itself points out, the precedents on "governmental

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[38] 323 U.S. 192 (1944).

[39] CWA cites *Steele* only once, in its discussion of the "primary-jurisdiction" issue, *not* in relation to "governmental action". BP at 8.

More glaringly evasive is the brief *amicus curiae* of the United States, which cites *Steele* not at all, while expressing the Solicitor General's disbelief that the pre-emption theory of *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956), is "a satisfactory basis * * * for finding governmental action". Brief for the United States as Amicus Curiae (BUS) at 25-27. The Court should know that, before writing this brief, the Solicitor General, the General Counsel of the National Labor Relations Board, and other government personnel met with the Employees' counsel. At that time, the latter fully apprised all present of the Employees' reliance on *Steele* as controlling authority on the "governmental-action" issue. That, notwithstanding this early and complete intelligence, the Solicitor General found himself quite unable, not only to disprove the materiality of *Steele*, but even frankly to admit the existence of the case by so much as citing it, exposes the position of the United States as the product of politics rather than principle or precedent, deserving of as much consideration in the Court's deliberations as the Solicitor General chose to give to *Steele*.

[40] Railway Employes' Dep't v. Hanson, 351 U.S. 225 (1956).

[41] BP at 16-21.

action" under the RLA and NLRA begin as early as 1944, with *Steele*.[42]

Steele faced the question of whether an exclusive representative under RLA Section 2, Fourth may discriminate against nonunion employees. The Court easily divined "governmental action" sufficient to raise constitutional issues:

> For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitation on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on [the nonunion employees] the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the [union's] own members, *we must decide the constitutional questions* * * * .

Avoiding these questions by statutory construction, the Court concluded that

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[42] 351 U.S. at 231: "the federal statute [*i.e.*, the RLA] is the source of the power and authority by which any private rights [of nonunion employees] are lost or sacrificed. Cf. *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192, 198-99, 204" (footnote omitted). As explained in detail below, these pages in *Steele* identify *exclusive representation* as the point of infusion of "governmental action" into the national labor laws.

Explication of *Hanson's* shadowy verbiage is not worthwhile. For even if, as CWA contends, *Hanson* found "governmental action" in Section 2, Eleventh on the exclusive basis of pre-emption, it would not preclude the discovery of *other* bases for finding "governmental action" in that section. Indeed, *Hanson* itself referred to others. 351 U.S. at 231-32 & n.4. Moreover, *Hanson* could be wrong on pre-emption as the source of "governmental action" in Section 2, Eleventh, and nevertheless correct on its existence. Indeed, this Court's opinion in *Ellis* v. *BRAC* indicates as much, by applying constitutional restraints to that section in a case arising in California, which (unlike Nebraska, whence *Hanson* arose) has no "right-to-work" law. *Contrast* 466 U.S. 435, 440, 455 (1984) *with* Hanson, 351 U.S. at 232 n.5.

> the Railway Labor Act imposes on the * * * representative * * * *at least* as exacting a duty to protect equally the interests of the members of the craft *as the Constitution* imposes upon a legislature to give equal protection to the interests of those for whom it legislates. *Congress has seen fit to clothe the representative with powers comparable to those possessed by a legislative body* both to create and restrict the rights of those whom it represents, * * * but it has also imposed on the representative a corresponding duty.

And, in his concurring opinion, Justice Murphy found that the

> *constitutional problem inherent in this instance is clear.* Congress, through the Railway Labor Act, has conferred upon the union * * * the power to represent the entire craft * * * in all collective bargaining matters. *While such a union is essentially a private organization, its power to represent and bind all members of a class* * * * *is derived solely from Congress.* The Act contains no language which directs the manner in which the bargaining representative shall perform its duties. But it cannot be assumed that Congress meant to authorize the representative to act *so as to ignore rights guaranteed by the Constitution.* Otherwise the Act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect.[43]

Thus, *Steele* fixes the locus of "governmental action" in exclusive representation, refuting CWA's claim that *any* agreement an exclusive representative negotiates—and *a fortiori* an 8(a)(3)-agreement CWA itself concedes arguably discriminates against nonunion employees—is the product of "private" action.[44]

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[43] 323 U.S. at 198-99, 203 (emphasis supplied); 208 (separate opinion; emphasis supplied).

[44] BP at 13-16.

Decisively here, in holding that nonunion employees "are * * * deprived by [RLA Section 2, Fourth] of the right, which they would otherwise possess, to choose a representative of their own, and * * * cannot bargain individually", *Steele* referred to "the like provision of the [NLRA]" (Section 9(a)), and cited NLRA judicial precedents and legislative history as authority.[45] This equation of the two acts is hardly surprising, exclusive representation having been held identical under each seven years earlier.[46] Thus expectable was the Court's immediate extension of the duty of fair representation from the RLA to the NLRA, and its consistent explanation thereafter that *Steele* was the common source of the duty under both statutes.[47]

Since *Steele* in 1944, and bracketing the 1956 date of *Hanson*, this Court has repeatedly emphasized, citing *Steele*, the strong current of "governmental action" perfusing Section 9(a).[48] And it has *never* held, or even intimated, the contrary.[49]

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[45] 323 U.S. at 200, 202 n.3, *citing inter alia* J.I. Case Co. v. NLRB, 321 U.S. 332 (1944), *and* Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944), *along with* Order of Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944) (an RLA case that relied on *J.I. Case Co.* as authority).

[46] Jones & Laughlin Steel Corp., 301 U.S. at 44-45, *citing* Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515, 548-49 (1937).

[47] *See* Wallace Corp. v. NLRB, 323 U.S. 248, 255-56 (1944); Ford Motor Co. v. Huffman, 345 U.S. 330, 336-38 (1953), *origin explained in* Vaca, 386 U.S. at 177. So, as to exclusive representation, CWA is wrong to describe the NLRA and RLA as "materially different" from each other. BP at 12.

[48] *See* American Communications Ass'n v. Douds, 339 U.S. 382, 401-02 (1950); Vaca, 386 U.S. at 181-83; Allis-Chalmers Mfg. Co., 388 U.S. at 180-81.

[49] *Pace* CWA, BP at 19, and the United States, BUS at 26, who claim that *Steelworkers* v. *Weber*, 443 U.S. 193, 200 (1979), and *Steelworkers* v. *Sadlowski*, 457 U.S. 102, 121 n.16 (1982), are *contra*. In *Weber*, the complainant emphasized that "[t]his case arises under Title VII. No claim for relief based on the constitution is presented". Brief of Brian F. Weber, at 46 (footnotes omitted). This Court did note that, "[s]ince the Kaiser-UAW plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause of the Four-

continued

Of course, *Steele* and its progeny address exclusive representation, not 8(a)(3)-agreements. But, both the RLA and the NLRA condition a union's license to negotiate a Section 2, Eleventh- or 8(a)(3)-agreement on its status as a Section 2, Fourth or 9(a) representative. Moreover, this Court has countenanced Section 2, Eleventh-agreements because of the "fairness" in spreading to nonunion employees the costs incurred by exclusive representatives perforce of their statutory duty, under *Steele*, to represent these employees "fairly and equitably".[50] And this Court has acknowledged a similar causal link under the NLRA between exclusive representation and the need "to provide that there be no employees who are getting the benefits of union representation without paying for them".[51] Thus, the injection of "governmental action" into an 8(a)(3)-agreement, through the union's Section 9(a) status, could be no more direct in the language and operation of the statute—or more recognized in this Court's precedents both before and after *Hanson*—than it is.[52]

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teenth Amendment". 443 U.S. at 200. But that an agreement negotiated under color of a *national* law (the NLRA) does not involve *state* action says nothing about whether such an agreement involves "governmental action" at the *national* level.

In *Sadlowski*, complainant *voluntary union members* challenged an *internal* union election-rule. The case raised no issue of the union's authority as a Section 9(a) representative of *nonunion* employees. This Court rejected on "governmental-action" grounds Sadlowski's claim that the First Amendment applied to the internal union rule. 457 U.S. at 121 n.16. But that the *internal* relationship between a union and its *voluntary members* is not infused with "governmental action" says nothing about whether the *external* relationship between the union and *nonunion employees* forced to accept it as their exclusive representative is the product of "governmental action".

[50] IAM v. Street, 367 U.S. 740, 759-61 (1961). *See also* Hanson, 351 U.S. at 231, 235.

[51] Oil, Chemical and Atomic Workers Union v. Mobil Oil Corp., 426 U.S. 407, 415 (1976); *accord*, Radio Officers' Union v. NLRB, 347 U.S. 17, 40-41 (1954).

[52] Certainly Justice Douglas, the author of *Hanson*, had no difficulty thereafter espying "governmental action" in an 8(a)(3)-agreement. Buckley v. AFTRA, 419 U.S. 1093, 1095 (1974) (dissenting from denial of certiorari). And neither has Congress. *See* 126 *Cong. Rec.* 2580-85 (11 February 1980) (debate on NLRA amendment ultimately enacted as Pub. L. 96-593, 94 Stat. 3452, *now* 29 U.S.C. § 169).

3. CWA's alleged "precedents". *Pace* CWA and the United States, this Court's "governmental-action" decisions outside the peculiar area of labor relations—and, for that reason, of questionable relevance in the first place—*support* the conclusion *Steele* reached. *Jackson* v. *Metropolitan Edison Co.*, for example, did not hold an entity's "monopoly status" irrelevant to its *quasi*-governmental character, but simply required a "[s]ufficient relationship" between the entity's monopoly and its challenged actions.[53] Here, the relationship between the challenged 8(a)(3)-agreement and CWA's "monopoly status" as the Employees' Section 9(a) representative is enabling and causal, not just "sufficient". Similarly, *San Francisco Arts & Athletics, Inc.* v. *USOC* did not hold a congressional grant of *any* exclusive right to a private entity irrelevant to "governmental action", but simply ruled a grant of "a limited property right in the word 'Olympic'" "within the scope of trademark protections", because the USOC had earlier "distinguished the word * * * through its own efforts", and thereby acquired an exclusive right to use it.[54] To rely on that case, CWA must argue that Section 9(a) recognizes its *pre*-existing "limited property right" *in the Employees and their employment*! Hopefully, civilized discourse in this country no longer tolerates such notions.[55] Finally, *Church of Jesus Christ of Latter-Day Saints* v. *Amos* did not hold a congressional exemption from a statutory prohibition of "private" conduct arguably protected by the First Amendment irrelevant to "governmental action"—to the contrary, the Court treated the very existence of the exemption as a compelling cause for constitutional scrutiny.[56]

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[53] *Contrast* BP at 16-17 *with* 419 U.S. 345, 351-52 (1974).

[54] *Contrast* BP at 17-18 *with* 107 S. Ct. 2971, 2980 (1987).

[55] *See* U.S. Const. amend. XIII.

[56] *Contrast* BP at 15-16 *with* 107 U.S. 2862, 2865 (opinion of the Court), 2870 n.1 (opinion of Brennan, J.), 2874 (opinion of O'Connor, J.) (1987).

Other of this Court's decisions offer analogies favorable to the Employees.[57] But, even without their weight, CWA's case on "governmental action" collapses: For *Steele* and its progeny control. And neither CWA nor the United States can muster the wit or pluck to address their challenge.

4. Summary of the Employees' Section 9(a), 8(a)(3) analysis. "Governmental action" arises from CWA's Section 9(a) status as the Employees' exclusive representative uniquely authorized to negotiate an 8(a)(3)-agreement in derogation of their *pre*-NLRA common-law powers and privileges to contract for themselves. *Steele* found "governmental action" in exclusive representation, holding that constitutional questions would arise if that status licensed discrimination against nonunion employees. The provisos to Section 8(a)(3) permit agreements that are *per se* "discriminatory" (in that they compel unwanted affiliations with unions), but permissible to the extent they require "employees who receive the benefits of union representation * * * to contribute their share of financial support to [the] union", and not "for any purpose other than" that.[58] If (as CWA urges) Congress intended the Section 8(a)(3) exemption to permit discrimination against nonunion employees beyond the *quid pro quo* of "dues" and "fees" in exchange for services rendered by the exclusive representative in that capacity, then the constitutional issues of which *Steele* warned must be addressed.

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[57] "Governmental action" obtains here because: (1) Section 9(a) politicizes employees' rights through elections imposed and regulated by the national government. *See* Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 157-58 (1978) (collecting authorities). (2) The NLRA does not merely "approve" 8(a)(3)-agreements, but creates the Section 9(a) privileges and powers unions exercise to negotiate them. *Cf.* Lugar, 457 U.S. at 937. (3) An 8(a)(3)-agreement derives from a union's Section 9(a) status, which itself derives from the union's invocation of the act's election-machinery. *Cf. id.* at 932-34. (4) But for its governmentally granted Section 9(a) status, for which Congress is ultimately responsible, a union may not compel nonunion employees to pay "fees" to it. *Cf.* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982). (5) A union possesses Section 9(a) functions and powers only by virtue of national law. *Cf.* Polk County v. Dodson, 454 U.S. 312, 317-18 (1981).

[58] Radio Officers' Union, 347 U.S. at 39-42.

B. Irrespective of the "governmental action" infusing them, Sections 8(a)(3) and 9(a) limit the "dues" and "fees" CWA may demand from the Employees to their *pro rata* share of the costs of performing its statutory duties as their exclusive representative.

These issues need not be faced, however, because the most reasonable construction of Sections 8(a)(3) and 9(a), consistent with their undeniably primary purpose, is that CWA may require the Employees to pay no more than the *pro rata* share of the costs of performing its statutory duties as exclusive representative. This construction of the NLRA finds compelling support in the Court's identical construction of Sections 2, Eleventh and 2, Fourth of the RLA, sections parallel in language and purpose to their NLRA counterparts, and enacted in 1951 precisely to extend to exclusive representatives under the former act the privilege to negotiate 8(a)(3)-type agreements permitted in the latter act in 1947.

1. The most reasonable construction of the language of Sections 8(a)(3) and 9(a), informed by their legislative purpose, limits the "dues" and "fees" CWA may demand from the Employees.

Section 8(a)(3) is "not ambiguous".[59] This circumstance, however, does not obviate thoughtful construction of that section in the context of other relevant sections of the act, in light of the section's legislative purpose, and with deference to this Court's precedents. Such an approach CWA does not take, though, instead offering a naively *hyper*-literalistic reading of Section 8(a)(3) that pretermits all those considerations.

CWA assumes—without proof—that "dues" and "fees" in Section 8(a)(3) refer to whatever a union charges its volun-

[59] *Id.* at 42, *quoted in* BP at 21.

tary members for its institutional activities, *whether or not those activities constitute performance of its statutory duties as a Section 9(a) representative*: that is, "*full* union dues".[60] Were this simplism proper, "membership" in Section 8(a)(3) would also mean "*full* union membership" in an institutional sense, *with all its badges and incidents beyond mere representation under Section 9(a).*

This, however, is not the law. Relying on the intent of Congress "to prevent utilization of [8(a)(3)-]agreements for any purpose other than to compel payment of union dues and fees",[61] this Court has repeatedly held that "the burdens of membership upon which employment may be conditioned are expressly limited to * * * payment * * *. 'Membership' is whittled down to its financial core".[62] The Court justified this departure from CWA's naif reading of "membership" by explaining how "the 1947 amendments [to Section 8 of the NLRA] * * * made significant alterations in the meaning of 'membership' for the purposes of [8(a)(3)-agreements]".[63] And if this approach is required to define "membership", it must be equally mandatory to define "dues" and "fees".

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[60] CWA's assumption derives not from a statutory definition of "dues" and "fees"; for none there is. Neither does it arise from any analysis disproving the Employees' position. Rather, CWA dilates on "legislative history" supposedly evidencing congressional intent to license limitless exactions through 8(a)(3)-agreements. But this history begs the question of what Congress meant by the words "dues" and "fees". For nowhere does it define those terms as "*full* union dues". Instead, to the extent leading legislators relied on the so-called "Rand Formula" for an implicit definition, the history refutes CWA's theory. *Contrast BP* at 33-34 *and* BUS at 16 *with post*, pp. 21-22.

[61] Radio Officers' Union, 347 U.S. at 40-42.

[62] NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963). *Accord*, Local 1625, Retail Clerks v. Schermerhorn, 373 U.S. 746, 751 (1963); Pattern Makers' League of North America v. NLRB, ____ U.S. ____, ____ & n.16, 105 S. Ct. 3064, 3071 & n.16 (1985).

[63] General Motors Corp., 373 U.S. at 742.

a. Statutory language and logic. A limited construction of "dues" and "fees" in Section 8(a)(3) follows from the interrelationship among NLRA Sections 2(5), 7, 8(a)(3), 8(d), and 9(a). Section 2(5) defines a "labor organization" as

> any organization * * * which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Although this definition—intentionally narrow for the special purposes of the statute—can subsume a traditional union such as CWA, which has many *extra*-statutory purposes, it indicates that *those* purposes are *not* what a "labor organization" may rely upon the NLRA to further. Then, Section 7 grants all employees the "right to refrain" from

> concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * * except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3)] * * * .

Coupled with this Court's decisions in which "'[m]embership' is whittled down to its financial core", this section exposes nonunion employees to a limited liability to pay "dues" and "fees" to a "labor organization" the unique statutory purpose of which is "dealing with employers concerning * * * conditions of work". Next, Section 8(a)(3) disallows even that liability unless "such labor organization is the representative of the employees as provided in section [9(a)]". Thus, the "labor organization" not only must have an unique statutory purpose, but also must enjoy the special statutory status of an exclusive representative. Section 9(a), though, emphasizes that

> [r]epresentatives designated for the purposes of collective bargaining by a majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees * * * for the purposes of collective bargaining * * * .

In such wise, the act mandates that "*the* purpose" an organization must have to qualify as a "labor organization" is the *only* purpose for which it may act as an exclusive representative. And finally, Section 8(d) re-emphasizes a "labor organization's" circumscribed authority, by defining "collective bargaining" as used in Section 9(a) to mean the exclusive representative's statutory

> obligation * * * to meet * * * and confer [with the employer] in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached * * * .

So, overall, the act outlaws every 8(a)(3)-agreement that does not finance an exclusive representative *qua* representative only.

Indeed, if as a specific matter only a Section 9(a) representative may compel payments from nonunion employees under Sections 7 and 8(a)(3); and if as a general matter that representative may compel those employees to accept its decisions only as to "collective bargaining"; then the specific exception must reflect the general requirement, and limit the representative's use of those payments to "collective bargaining", too. Otherwise, neither the statutory language, nor this Court's construction of it, makes practical sense.[64]

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[64] In particular, adopting CWA's notion that non-bargaining, institutional expenditures of an exclusive representative may be the subject of an 8(a)(3)-agreement renders nonsensical "the policy of voluntary unionism imbedded in the [NLRA]". Pattern Makers' League of North America, ____ U.S. at ____, 105 S. Ct. at 3071.

b. Statutory purpose. These obvious inferences from statutory language and logic find vindication in the overriding congressional purpose underlying the Section 8(a)(3) provisos: namely, to eliminate so-called "free-riders". As this Court long-ago held, the lesson of the legislative history is that Congress enacted Section 8(a)(3) "to meet that problem".[65]

CWA pretends that Congress aimed Section 8(a)(3) only at certain historical "abuses", unconcerned with how exclusive representatives might spend coerced "dues" and "fees". The true burden of the debates, however, is that Congress perceived these abuses as "too serious and numerous to justify permitting [the then-existing] law [authorizing compulsory unionism] to remain unchanged", and adopted Section 8(a)(3) only after "leaders of organized labor * * * stressed * * * that in the absence of such provisions many employees sharing the benefits of what unions are able to accomplish by collective bargaining will refuse to pay their share of the costs"[66]—that is, after "leaders of organized labor" raised the "free-rider" problem as justification for 8(a)(3)-agreements.

Of course, finding the result uncongenial today, the "leaders of organized labor" now before this Court unabashedly repudiate the legislative compromise of 1947, and deny the "free-rider" limitation in Section 8(a)(3). Yet both they and their political allies admit that, in that section, Congress "adopt[ed] the 'Rand Formula'", from a then-recent arbitration-decision of Justice I.C. Rand of the Supreme Court of Canada.[67] The "Rand formula", however, unequivocally applies the "free-rider" thesis, holding it

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[65] Radio Officers' Union, 347 U.S. at 41. "Congress' decision to allow [8(a)(3)-] agreements *at all* reflects [that] concern * * * ." Oil, Chemical and Atomic Workers Union, 426 U.S. at 415-16 (emphasis supplied).

[66] Sen. Rep. No. 105, 80th Cong., 1st Sess. (1947), at 6.

[67] BP at 38, 33-34; BUS at 16 & n.14.

> not * * * inequitable to require of all employees a contribution towards the expense of maintaining employee interests, of administering the law of their employment[,]

and defining "the amount to be deducted" from employees' wages as *not* including

> an increment in an assessment which relates to special union benefits * * * in which the non-member employee as such would not participate or the benefit of which he would not enjoy.[68]

In as much as nonunion employees cannot require a union to provide benefits that do not derive from the union's status as exclusive representative, and the union cannot require the employees to accord it that status other than with respect to "collective bargaining" as defined in Section 8(d), the "Rand Formula" amounts to a precursor of the "test" this Court adopted under Sections 2, Fourth and 2, Eleventh of the RLA: namely,

> whether the * * * expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the [nonunion] employees in dealing with the employer on labor-management issues.[69]

In sum, its language, logic, and purpose sustain as the most reasonable construction of Section 8(a)(3) limitation of "dues" and "fees" to the Employees' *pro rata* share of the costs CWA incurs performing its Section 9(a) duties.[70]

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[68] *In re* Arbitration between Ford Motor Co. of Canada, Ltd. and UAW, 17 L.R.R.M. 2782, 2783 (1946).

[69] Ellis, 466 U.S. at 448.

[70] The National Labor Relations Board ("Board") has taken contradictory positions. Local No. 959, Teamsters (RCA Service Co.), 167 N.L.R.B. 1042, 1044-45

continued

2. The parallel language and purpose of Sections 8(a)(3) and 9(a) of the National Labor Relations Act and Sections 2, Eleventh and 2, Fourth of the Railway Labor Act compel application to Sections 8(a)(3) and 9(a) of the limiting construction this Court has repeatedly applied to Sections 2, Eleventh and 2, Fourth.

The language, purpose, legal history, and this Court's interpretation of Section 2, Eleventh confirm the Employees' construction of Section 8(a)(3).

CWA contends that "NLRA § 8(a)(3) cannot plausibly be read as was RLA § 2, Eleventh", for two reasons: (i) this Court's construction of Section 2, Eleventh was strained to avoid deciding constitutional questions that cannot arise with respect to Section 8(a)(3) because of the lack of "governmental action" therein; and (ii) the historical evolution of the two sections was different.[71] But what appears "implausible" to CWA this Court and leading commentators have accepted as self-evident.[72] And CWA's thesis is less than cogent, anyway: For, first, there is as much "governmental action" in the NLRA as in the RLA (as the Employees explain in Part I.A., *ante*); and, even if there

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(1967); Detroit Mailers Union No. 40, 192 N.L.R.B. 951, 951-52 (1971). Typically, CWA pretends this schizophrenic behavior never occurred, saying that the Board has "consistent[ly]" supported its view. BP at 23 n.13. The United States attempts to finesse the embarassment. *See* BUS at 14, 23 (citing the decisions for other propositions).

[71] BP at 40-42. The United States tags along on these arguments, too. BUS at 21-26.

[72] *Compare* Ellis, 466 U.S. at 452 n.13 (Sections 8(a)(3) and 2, Eleventh are "equivalent provision[s]"), *with, e.g.*, Blair, "Union Security Agreements in Public Employment", 60 *Cornell L. Rev.* 183, 194 (1975); Cantor, "Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association", 36 *Rutgers L. Rev.* 3, 41 n.219 (1984); *and* Henkel & Wood, "Limitations on the Uses of Union Shop Funds After Ellis: What Activities are 'Germane' to Collective Bargaining?", 35 *Lab. L.J.* 736, 743 (1984).

were not, this Court characterized its initial construction of Section 2, Eleventh in *Street* as "entirely reasonable", not merely a "fairly possible" excuse for evading constitutional issues.[73] Second, how the NLRA and RLA separately arrived at parallel—and, in the most important particulars, *identical*—language cannot detract from that parallelism and identity. Indeed, to contend as does CWA that two statutes containing essentially the same language, dealing with the same subject-matter, having the same purpose, and the earlier serving as the model for the later can nevertheless have, not only different, but even radically opposed meanings amounts to "doublethink" in the classical Orwellian pattern, as well as violating basic canons of statutory construction.[74]

a. The parallel statutory language. The linguistic parallel between the NLRA and the RLA could not be more exact than it is. First, both statutes afford employees a right to collective bargaining.[75] Second, both provide for exclusive representation to effectuate collective bargaining.[76] Third, both initially immunize nonunion employees from *pro-* or *anti-*union discrimination.[77] But, fourth, both then partially license such discrimination in 8(a)(3)-type agreements, in next-to-identical language limiting the charges thereunder to uniform "dues" and "fees".[78] The statutes, in short, are (as this Court has noted) "equivalent provision[s]".[79]

Of particular consequence is the parallel language referring to "periodic dues" and "initiation fees" "required as a

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[73] 367 U.S. at 750. [74] *See, e.g.*, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979).

[75] NLRA § 7; RLA § 2, Fourth. [76] NLRA § 9(a); RLA § 2, Fourth.

[77] NLRA § 8(a)(3); RLA § 2, Fourth.

[78] NLRA § 8(a)(3); RLA § 2, Eleventh. The reference to "assessments" in the RLA adds nothing in comparison to the NLRA. For, as *Hanson* held, "[i]f 'assessments' are in fact imposed for purposes not germane to collective bargaining", they are subject to the same restraint as "dues". 351 U.S. at 235. *See also* Street, 367 U.S. at 766; Ellis, 466 U.S. at 445-48.

[79] Ellis, 466 U.S. at 452 n.13.

condition of acquiring or retaining membership". This first appeared in the NLRA in 1947, being added to the RLA in 1951 as a "safeguar[d] * * * to protect dissenters' rights", Congress having become concerned that Section 2, Eleventh as originally proposed

> might be used to abridge freedom of speech and beliefs.* * *Objections of this kind led the rail unions to propose an addition [of the above-quoted language. A leading union witness] presented this text and stated, "* * * this bill with the amendment as suggested * * * remedies the alleged abuses of compulsory union membership * * * , yet makes possible the elimination of the 'free rider' and the sharing of the burden of maintenance by all of the beneficiaries of union activity."[80]

What this language meant the witness himself—and, relying on his testimony, among other evidence, this Court in *Street*—made clear, as the Employees describe *post*. Whence the language derived is obvious: from the 1947 amendment of Section 8(a)(3). And Congress itself understood the 1951 amendment precisely as an extension to railway employees of the privilege to make limited 8(a)(3)-type agreements granted to all other employees by the 1947 amendment. Certainly this was the view of the House[81] and Senate[82] committees supervising the bill, of Senators Taft[83] and Hill[84] who joined in supporting it, and of every other Senator and Representative who addressed the question.[85] Indeed, one

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[80] Street, 367 U.S. at 765-66.

[81] H.R. Rep. No. 2811, 81st Cong., 2d Sess. (1950), at 4.

[82] Sen. Rep. No. 2263, 81st Cong., 2d Sess. (1950), at 3.

[83] 96 *Cong. Rec.* 16,267 (1950). [84] *Id.* at 15,735-36; 15,737; 15,738; 16,261.

[85] *Id.* at 15,740 (Sen. Lehman); 16,280 (Sen. Holland); 16,323 (Sen. Thomas); 16,372 (Sen. Pepper); 17,048-49 (Rep. Beckworth); 17,050 (Rep. Hoffman); 17,050-51 (Rep. Wolverton); 17,055 (Rep. Scott); 17,055 (Rep. Biemiller); 17,056 (Rep. Heselton); 17,056 (Rep. Bennett); 17,056 (Rep. Crawford); 17,057 (Rep. Crosser); 17,059 (Rep. Madden); 17,061 (Rep. Vursell).

would presume that Senator Taft, of all people, would have known if the provisions of Section 2, Eleventh were, as he himself characterized them, "*identical* with the Taft-Hartley law" of 1947, that is, Section 8(a)(3).

b. The parallel statutory purpose. Not surprisingly, the linguistic parallel between the acts reflects an identity of purpose addressed to the "free-rider" issue. In *Street*, having exhaustively reviewed the legislative history of Section 2, Eleventh, this Court held that that section

> contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes. One looks in vain for any suggestion that Congress also meant * * * to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose.[86]

That limited purpose, of course, is what also animated Section 8(a)(3).[87] Certainly, in that provision as in Section 2, Eleventh, "[o]ne looks in vain for any suggestion that Congress * * * meant * * * to provide the unions with a means for forcing employees * * * to support political causes which they oppose"—and CWA offers no substantiation for that suggestion.

In sum, the legislative and judicial history are compelling: In 1951, Congress enacted Section 2, Eleventh to extend to exclusive representatives under the RLA the same power to compel payments from nonunion employees it had granted under Section 8(a)(3) in 1947. In 1961, this Court held in *Street* that Congress intended the 1951 amendment

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[86] 367 U.S. at 763-64 (footnote omitted). *Accord*, Hanson, 351 U.S. at 235, 238.

[87] *See ante*, pp. 21-22.

to confine compulsory payments to the representatives' costs of collective bargaining. If this Court now decides, as CWA and the United States urge, that Section 8(a)(3) grants *un*limited authority to extract "dues" and "fees" from non-union employees, it must admit that *Street* was wrongly decided, and that the constitutionality of compulsory union "dues" and "fees" under the RLA, *and in the public sector under* Abood v. Detroit Board of Education, is open to re-examination (in addition to the constitutionality of those payments under the NLRA being *sub judice* here).[88] For the Congress that enacted Section 2, Eleventh could not have intended to follow Section 8(a)(3) merely linguistically but not substantively. Indeed, if the language of the latter section compels the construction upon which CWA insists, then the language of the former section, enacted in light of the latter and for the express purpose of achieving uniformity of policy in both acts, *must* extend unlimited license to exclusive representatives; *Hanson*, *Street*, *and Abood must* be wrong; and the most important constitutional issues in this area *must* be recognized as unsettled.

Conversely, if this Court determines that *Hanson* and *Street* are correct, after all, but that Section 8(a)(3) need *not*

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[88] *Hanson* predicated its constitutional decision, upholding Section 2, Eleventh "on its face", on the statutory interpretation that Congress meant only for "the beneficiaries of trade unionism to contribute to its cost", and that "[t]he financial support required relates * * * to the work of the union in the realm of collective bargaining" only. 351 U.S. at 235. If this construction is now repudiated, then (as *Hanson* itself conceded) its "judgment will not prejudice the decision" in a case challenging the constitutionality of Section 2, Eleventh even "on its face". *Id.* at 238.

In upholding 8(a)(3)-type agreements in public-sector employment, the *Abood* Court relied on "the judgment * * * made in *Hanson* and *Street*", noted that "those two decisions * * * appear to require validation of the [public-sector] agreement [*sub judice*]", and treated "*Hanson* and *Street* as controlling". 431 U.S. 209, 217-32. If this Court now determines that *Street* was wrongly decided—and, therefore, that *Hanson* too rests on a faulty premiss of statutory construction—then *Abood* must fall as well.

be construed as was Section 2, Eleventh, it will frustrate the manifest intent of Congress and numerous state legislatures to erect a truly *uniform* national labor policy as far as 8(a)(3)-type agreements are concerned. For example, CWA represents nonunion employees subject to 8(a)(3)-type agreements throughout the private and public sectors.[89] Where the RLA and public-sector laws govern, nonunion employees represented by CWA will be subject to compulsory payments of around 20% of CWA's regular membership-dues (using the figures found appropriate after two plenary hearings below). Whereas, where the NLRA governs, other nonunion employees represented by CWA—and for whom CWA provides essentially the same services in collective bargaining—will be subject to compulsory payments equal to CWA's membership-dues. And this nearly *five-fold* disparity will have no rational connexion to any extra benefits the second set of employees arguably receives. To justify such unequal and nonrational treatment is impossible, as a matter of the premisses of labor law, of the language of Sections 2, Eleventh and 8(a)(3), of what Congress said it was doing in 1947 and 1951, and of this Court's decisions in *Radio Officers' Union, General Motors Corp.*, *Hanson*, *Street*, and particularly *Abood*, the burden of which is the uniformity of purpose infusing the NLRA, RLA, and public-sector bargaining laws as far as exclusive representation and 8(a)(3)-type agreements are concerned.[90]

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[89] This case involves a typical NLRA certification. As examples of RLA certifications, *see In re* Representation of Employees of Air India Teletype Operators, Case No. R-3793 (Nat'l Mediation Bd., 27 October 1965); *In re* Representation of Employees of British Overseas Airways Corp., Teletype Operators, Case No. R-3832 (Nat'l Mediation Bd., 30 June 1966). CWA's presence in public-sector bargaining is exemplified by *Robinson* v. *New Jersey*, No. 86-1654 (U.S., October Term 1986), *cert. denied* 26 May 1987.

[90] *See* 431 U.S. at 220-25, comparing the NLRA, the RLA, and Michigan law under consideration there.

C. If Sections 8(a)(3) and 9(a) do not preclude CWA from conditioning the employment of nonunion employees upon payment of the costs of "collective bargaining" only, those sections are repugnant to the First and Fifth Amendments because they license CWA to abridge the Employees' freedoms of association and speech, and confiscate portions of their wages, without any compelling governmental interest in, or even rational basis for, such abridgement and confiscation.

Amazingly, CWA and the United States both ultimately rely solely on the absence of "governmental action" in 8(a)(3)-agreements—saying nothing about the constitutionality *vel non* of the NLRA if "governmental action" exists and their unlimited statutory construction is adopted. This curious silence, coupled with their craven refusal to address *Steele*, impliedly admits they can conjure no theory of constitutionality for Section 8(a)(3) as they interpret it, at least in light of *Abood*.[91] Nevertheless, the Employees will not rely merely on this admission by omission, or solely on *Abood*, to establish the unconstitutionality of Sections 8(a)(3) and 9(a) should this Court accept CWA's construction. Moreover, because of the dearth of analysis in CWA's brief, the Employees respectfully urge this Court, if it must address the constitutional issues, to order the parties to submit further arguments on the subject.

Three aspects of the unconstitutionality of CWA's construction of Section 8(a)(3) are subject to summary treatment: first, its violation of the Employees' First-Amendment rights, under the doctrine this Court enunciated in *Abood*; second, its violation of their Fifth-Amendment rights, as a delegation to private parties of a power to "tax"; and third,

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[91] Thus, CWA's bluff that "this case * * * is entirely unlike *Abood*". BP at 12 n.8. The United States seems to accept *Abood* as controlling where "governmental action" is present. *See* BUS at 28.

its violation of their Fifth-Amendment rights as a statutory condition on their employment without legitimate rational basis.

1. The **Abood** *doctrine.* Although the Employees benefit from an unqualified reading of *Abood*, concern for a correct rather than a convenient resolution of this case counsels them to treat that decision's complexities with candor. In fact, in *Abood* this Court divided over whether an 8(a)(3)-type agreement in public employment is constitutional where the exclusive representative uses the payments solely to defray the costs of bargaining, some Justices suggesting that such a use serves substantial governmental interests, while other Justices questioned that assumption.[92] And the existence *vel non* of substantial—or, indeed, of any kind of—governmental interests subtending the state law at issue was an *assumption* only, not a fact. For the appeal came to the Court devoid of any factual record,[93] leaving the question *un*resolved *strictissimi juris*.[94] However, every Justice but one[95] agreed that compulsory payments to finance activities of the exclusive representative other than collective bargaining *absolutely* violate the First and Fourteenth Amend-

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[92] *Contrast* 431 U.S. at 224-26 (opinion of Stewart, J.) *with id.* at 259-64 (opinion of Powell, J.).

[93] *Id.*at 236 (opinion of Stewart, J.), 244 n. (opinion of Stevens, J.).

[94] *Compare* Polk Co. v. Glover, 305 U.S. 5, 10 (1938), *and* Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 212 (1934) (essential facts should be decided before Court addresses constitutional issue), *with* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938), *and* Borden's Farm Prods. Co., 293 U.S. at 209-13 (litigant has constitutional right to adduce facts to disprove rational basis of statute).

Importantly, *Hanson* and *Street*, upon which *Abood* primarily relied, mitigate this problem not at all. For *Hanson*, too, was bereft of the necessary factual record; and, although that record obtained in *Street*, the Court there avoided a constitutional decision through construction of Section 2, Eleventh. *Compare* 351 U.S. at 236-38 *with* 367 U.S. at 746-50.

[95] 431 U.S. at 243-44 (opinion of Rehnquist, J.).

ments.[96] CWA's construction of Section 8(a)(3) permits such payments, and therefore condemns itself under *Abood*.

2. The problem of private "taxation". The common jargon for the type of 8(a)(3)-agreement at issue here is an "agency-fee" arrangement, signifying payment by nonunion employees (the "fee") for the union's services as exclusive representative (the "agency"). The compulsory character of exclusive representation renders the adjective "agency" misleading; but the noun "fee" has peculiar constitutional significance.

The Due Process Clause of the Fifth Amendment disables Congress from delegating the sovereign power of taxation (or any power within Article I, Section 8 of the Constitution, for that matter) to private parties,[97] or from using that power for their exclusive benefit.[98] The authorization in Section 8(a)(3) for a Section 9(a) representative to collect "dues" and "fees" from nonunion employees, then, is necessarily unconstitutional unless those payments are distinguishable from taxes.

National Cable Television Association, Inc. v. *United States* differentiated "fees" from "taxes" in the context of assessments the Federal Communications Commission levied against broadcasters for services it performed for them.[99]

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[96] *Id.* at 230, 235-36 (opinion of Stewart, J.); 244 (opinion of Stevens, J.); 254 (opinion of Powell, J.). As Justice Powell said: "The Court today holds that compelling an employee to finance a union's ideological activities unrelated to collective bargaining violates the First Amendment *regardless of any asserted governmental justification.*" (Emphasis supplied.)

[97] *Compare* Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 514 (1937), *with* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935), *and* Carter v. Carter Coal Co., 298 U.S. 238, 311 (opinion of the Court), 318 (Hughes, C.J., concurring) (1936).

[98] *See*, under the Due Process Clause of the Fourteenth Amendment, Loan Association v. City of Topeka, 87 U.S. (20 Wall.) 655, 662-64 (1874); Cole v. City of La Grange, 113 U.S. 1, 6-7 (1885); City of Parkersburg v. Brown, 106 U.S. 487, 500-01 (1882).

[99] 415 U.S. 336 (1974).

Recognizing that "[t]axation is a legislative function", and that a legislature "may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay", this Court distinguished a "tax" from a "fee" on the ground that a "fee" is assessed for a service "which * * * bestows a benefit on the [payer], not shared by other members of society".[100] Then, the Court acknowledged that the statute would unconstitutionally delegate the power of taxation—*if* it licensed the FCC to assess "not only for benefits [broadcasters] received" from its services, but also for other of its activities unrelated to them in particular.[101] To avoid constitutional problems, the Court construed the statute narrowly, limiting the FCC's exactions to reflect actual benefits conferred on the broadcasters.[102] *National Cable Television Association* thus enunciated the principle that an assessment related to services an agency provides to the payer in particular is a constitutional "fee"; whereas, an assessment unrelated to such services is an unconstitutional "tax". And so the inferior national courts have interpreted that decision.[103]

Other decisions of this Court also rely on the constitutional dichotomy between "fees"—which fairly represent the costs of services provided to a select class of recipients, and "taxes"—which constitute "forced contribution to general governmental revenues".[104]

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[100] *Id.* at 340-41.

[101] *Id.* at 341-42, *citing* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), *and* Hampton & Co. v. United States, 276 U.S. 394 (1928).

[102] 415 U.S. at 341, 342-43. *Accord*, FPC v. New England Power Co, 415 U.S. 345, 349-51 (1974). *Contrast* Carmichael, 301 U.S. at 521-23; New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 584-87 (1938).

[103] *E.g.*, Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm'n, 601 F.2d 223, 227-28 (5th Cir. 1979); National Ass'n of Broadcasters v. FCC, 554 F.2d 1118, 1128-30 (D.C. Cir. 1976).

[104] Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 162-65 (1980); continued

CWA's construction of Section 8(a)(3) abjures any limitation of "dues" and "fees" to the demonstrable costs of statutorily permissible collective-bargaining services the exclusive representative provides nonunion employees. Rather, it blatantly defines those payments as intended to defray *all* expenses of a Section 9(a) union, including both the costs of performance of its statutory representational duties and its other, unrelated institutional expenses. CWA's construction thus unequivocally identifies Section 8(a)(3) payments as a species of private "taxes", and condemns that section as an unconstitutional delegation of legislative power to private parties.

3. The absence of a legitimate rational basis. An outstanding demerit of CWA's reading of Section 8(a)(3) is its failure to explain what legitimate purpose Congress could have had, in the context of the whole statutory scheme establishing collective bargaining through exclusive representation, for licensing the representatives to force nonunion employees to finance union institutional activities *unrelated* to bargaining. Indeed, neither CWA nor the United States even attempts to identify a rational basis for—let alone a "compelling" governmental interest in—such an arrangement.[105]

This absence of operational explanation for their radical position is hardly surprising, in light of the tight statutory interrelationship among Sections 8(a)(3), 8(d), and 9(a), discussed heretofore. What CWA fails to realize, however, is that, in the context of that interrelationship evidencing on the face of the statute the congressional purpose in setting up the system of exclusive representation, its construction

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Union Brokerage Co. v. Jensen, 322 U.S. 202, 210-11 (1944); New Mexico *ex rel.* E.J. McLean & Co. v. Denver & R.G.R.R., 203 U.S. 38, 55 (1906); Morgan's Steamship Co. v. Louisiana Board of Health, 118 U.S. 455, 461-62 (1886).

[105] *See* BP at 23-40; BUS at 14-20.

renders Section 8(a)(3) *pro tanto* unconstitutional because of the obvious lack of any rational connexion between, on the one hand, subordination of nonunion employees to Section 9(a) representatives for the limited purpose of Section 8(d) "collective bargaining" and, on the other hand, compulsory financial support from those employees for whatever institutional activities alien to that bargaining a union chooses to undertake.

The absence of rational connexion between Section 9(a) activities of an exclusive representative and the payment of "*full* union dues" is self-evident and undeniable through comparison of the limited statutory definition of "collective bargaining" to the experientially unlimited activities that unions traditionally subsidize with "*full* dues".[106] And this Court, in decision after decision, has foreclosed the question of what *unique* rational basis justifies 8(a)(3)-type agreements, by explaining the legislative license to make these agreements as a device, in the nature of *quantum meruit*, for guaranteeing reimbursement to an exclusive representative for the costs it incurs in providing beneficial services to nonunion employees through statutory "collective bargaining". For example, *Hanson* held that "the requirement [of Section 2, Eleventh] for financial support of the *collective bargaining* agency by all who receive the *benefits of its work* is [constitutional]".[107] *Street* relied on "the principal argument made by the unions" in support of the latter section,

> that because of the expense of performing their duties [as exclusive representatives], fairness justified spreading of the costs to all employees who benefitted. They thus advanced as the purpose the elimination of "free

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[106] *See* Local 1625, Retail Clerks v. Schermerhorn, 373 U.S. 746, 753-54 & n.6 (1963).

[107] 351 U.S. at 238 (emphasis supplied).

> riders"—those employees who obtained the *benefits of the unions' participation in the machinery of the Act* without financially supporting the unions.[108]

Then, referring to Section 8(a)(3), *General Motors Corp.* described how

> Congress recognized that in the absence of [an 8(a)(3)-agreement] "many employees sharing the benefits of what unions are able to accomplish *by collective bargaining* will refuse to pay their share of the cost." * * * As far as the federal law was concerned, all employees could be required to pay their way.[109]

And, surveying labor-relations experience in both the public and the private sectors, *Abood* again expounded that an 8(a)(3)-agreement

> has been thought to distribute fairly the cost of [collective bargaining] activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders"—to refuse to contribute to the union while obtaining *benefits of union representation* * * * .[110]

Even more specifically, this Court has pinpointed the rationale of 8(a)(3)-type arrangements by identifying the services for which "dues" and "fees" are chargeable. For example, *Hanson* held that "[t]he financial support required relates * * * to the work of the union *in the realm of collective bargaining*".[111] *Street* referred to "a use which helps

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[108] 367 U.S. at 761 (emphasis supplied). Concurring, Justice Douglas recalled that the Court had "concluded in [*Hanson*] that it was permissible for the legislature to require all who gain from *collective bargaining* to contribute to *its* cost". *Id.* at 776 (separate opinion) (emphasis supplied).

[109] 373 U.S. at 740-41 (emphasis supplied).

[110] 431 U.S. at 221-22 (opinion of Stewart, J.) (emphasis supplied).

[111] 351 U.S. at 235 (emphasis supplied).

defray the expenses *of the negotiation or administration of collective agreements*, or the expenses entailed in the adjustment of grievances and disputes".[112] *Abood* cited "[t]he tasks of *negotiating and administering a collective bargaining agreement* and representing the interests of employees in settling disputes and processing grievances"; "expenditures by the Union for the purpose of *collective bargaining, contract administration, and grievance adjustment*"; and "service charges * * * applied to *collective bargaining, contract administration, and grievance adjustment purposes*".[113] And *Ellis* re-affirmed as "the test" "whether the * * * expenditures are necessary or reasonably incurred for the purpose of performing the *duties of an exclusive representative* * * * in dealing with the employer on labor-management issues".[114]

In sum, *the one and only* rational basis—both on the face of the statute and as repeatedly recognized in this Court's opinions—for 8(a)(3)-agreements is to compel nonunion employees to pay their share of the costs of beneficial services they receive from the "collective-bargaining" activities of their Section 9(a) representative. To extend those payments beyond those costs in a wholly arbitrary and uncontrollable fashion, as CWA urges, would be to abandon this uniquely justifiable *quid pro quo* rationale, without a legitimate substitute, thereby undermining the constitutionality of Section 8(a)(3) in the most fundamental way possible.[115]

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[112] 367 U.S. at 768 (emphasis supplied).

[113] 431 U.S. at 221, 225-26, 232 (opinion of Stewart, J.) (emphasis supplied).

[114] 466 U.S. at 448 (emphasis supplied).

[115] Their statement alone explodes the notions that Congress may license unions to "tax" nonunion employees in order: (i) to pressure those employees into subjecting themselves to full union membership, rules, and discipline; (ii) to impose ideological conformity by forcing employees to subsidize union*ism per se*, as well as the political and social activism of unions; or (iii) to redistribute wealth from nonunion to union employees, by giving the latter an *ersatz* "property right" in the work of

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The foregoing establishes that: (i) Section 9(a) is the source of the "governmental action" infusing Section 8(a)(3), as clearly held in *Steele*; (ii) "governmental action" aside, those sections deny exclusive representatives authority to condition employment of nonunion employees on payments of "dues" or "fees" exceeding the employees' *pro rata* share of the representatives' statutory "collective-bargaining" costs; and (iii) if Sections 8(a)(3) and 9(a) do license exclusive representatives to compel arbitrary and unlimited payments, then those sections are *pro tanto* unconstitutional under the First and Fifth Amendments.

II. The violation of Sections 8(a)(3) and 9(a) found in this case is not within the "primary jurisdiction" of the National Labor Relations Board, under the doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

The parties' positions congress, in that all recognize the fundamental substantive issue in this case is the construction of NLRA Sections 7, 8(a)(3), and 9(a). Their positions diverge, in that CWA contends those sections permit, whereas the Employees assert that they prohibit, unlimited "dues" and "fees". Because, if CWA is correct, Section 7 privileges its behavior, or, if the Employees are correct, that behavior constitutes an "unfair labor practice" within the cognizance of the National Labor Relations Board under Section 8, the problem of "primary jurisdiction" arises perforce of this Court's decision in *San Diego Building Trades Council* v. *Garmon*.[116] Both CWA and the United States find *Garmon* inapplicable, because the instant case involves the duty of fair representation and constitu-

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the former. Purposes such as these cannot survive scrutiny under the Commerce Clause itself, let alone the First, Fifth, or Thirteenth Amendments. And even CWA shrinks from asserting them.

[116] 359 U.S. 236, 245 (1959).

tional questions.[117] Although the Employees also endorse these propositions, they submit that more detailed consideration of the matter is warranted.

A. CWA breached its duty of fair representation.

Erroneous is CWA's characterization of the Employees' claim as alleging a violation of the duty of fair representation for purposes of "primary jurisdiction", but failing to establish "arbitrary, discriminatory, or bad-faith" conduct.[118] For CWA's demand to charge the Employees "*full* union dues" under color of Section 8(a)(3) is, on its face, all of these.

1. Discriminatory conduct. CWA pretends it "has not acted in a '*discriminatory*' fashion", because it charged *all* employees in the bargaining unit the *same* "*full* union dues".[119] The duty of fair representation relates, however, not to CWA's overall institutional functions as a private association of voluntary members, but only to its *quasi*-governmental status as the Employees' compulsory exclusive representative. Thus, "discrimination" must be determined in the context, not of what CWA does as a private organization, but of the activities it has Section 9(a) permission to undertake.

CWA's "*full* union dues" include: (i) the portion used to finance Section 9(a) activities (the "collective-bargaining" amount, *CB*); and (ii) the portion used to finance its other, *extra*-representational activities (the "voluntary-member" amount, *VM*). CWA demands that *all* employees pay, by choice or by compulsion through the 8(a)(3)-agreement, *CB plus VM*. Now, because Sections 8(a)(3) and 9(a) license

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[117] BP at 6-11; BUS at 11 n.9.

[118] *Compare* BP at 9-10 *with id.* at 45-58.

[119] *Id.* at 45-46.

CWA to extract from the Employees *only CB* by force of law, but in fact CWA claims *CB and VM* under color of Section 8(a)(3), a stark dichotomy exists: (i) its voluntary members pay *only CB* under force of law, and *VM* voluntarily; whereas, (ii) the Employees pay *CB plus VM* under force of law—indeed, as the record emphasizes, nearly *five times* as much as the voluntary members pursuant to force of law, *CB* representing only some 19% of "*full* union dues". The discriminatory effects of this situation are two-fold:

First, if CWA expends *all* of the Employees' Section 8(a)(3) "dues" and "fees" on Section 9(a) activities, they pay for the same statutory "collective-bargaining" services more than CWA's voluntary members, precisely because of their nonunion status.[120]

Second, if CWA expends *some or all* of those receipts on its private institutional activities *outside* of Section 9(a), the Employees pay either for benefits they cannot receive because those benefits inure only to voluntary members, or for actual detriments they suffer because of the—noxious to them—political, ideological, economic, or social effects of CWA's *extra*-statutory actions that extend beyond its voluntary members and other partisans.

Thus, *pace* CWA, the Employees seek not to be treated "differently" from the union's voluntary members under Section 8(a)(3), but rather to pay the selfsame "dues" and "fees" for Section 9(a) services, without being required under color of law to make further payments.

2. Arbitrary conduct. Sensing that its claim of "nondiscriminatory" treatment lacks credibility, CWA defends its policy of requiring "*full* union dues" as "an entirely rational, non-arbitrary course" because

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[120] *See* Local 1625, Retail Clerks v. Schermerhorn, 373 U.S. 746, 753-54 (1963).

> [a] union represents—indeed must represent—all employees within the bargaining unit, and the union's accomplishments necessarily redound to the benefit of all members of the unit; that is true not only of gains achieved by a union in negotiating and administering collective bargaining agreements but also of gains achieved by the union through other means of furthering the represented workers' employment interests.[121]

The fallacy here, of course, is that "[a] union represents—indeed must represent—all employees within the bargaining unit" *only with respect to permissible Section 9(a) concerns*, and has *no* statutory "representational" authority to "furthe[r] * * * workers' employment interests" "through *other* means".[122] Thus, CWA's lament attempts either to read Section 9(a) out of Section 8(a)(3), or to expand Section 9(a) into an open-ended mandate to posture as the Employees' "Platonic Guardian". CWA's policy of requiring the Employees to pay "*full* union dues", in short, is necessarily *non*-rational and arbitrary, because it misapplies Section 9(a) to achieve union institutional goals unrelated to the purposes of the NLRA, and invalid under the First and Fifth Amendments *inter alia*.

CWA's apology that requiring "*full* union dues" "prevents the friction among employees that otherwise can arise within a bargaining unit if some employees pay less * * * than others" begs the question.[123] Because the only "dues" permissible under Section 8(a)(3) are the exclusive representative's costs of statutory "collective bargaining" under Sections 9(a) and 8(d), by paying only those costs all employees in the unit bear the *same* statutorily imposed (or permissible)

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[121] BP at 46.

[122] *See, e.g.*, National Treasury Employees Union v. FLRA, 800 F.2d 1165, 1168-71 (D.C. Cir. 1986) (Bork, J.).

[123] BP at 46-47.

financial burden. *No one* "pay[s] less in union dues than others" *under the statute*. That CWA's voluntary members may express rancour because nonunion employees choose not to subsidize its non-statutory activities exposes a deplorable lack of charity, but constitutes no legal basis for compelling nonunion employees to pay *more* for CWA's Section 9(a) activities, so that its members pay *less* for institutional programs.

Finally, CWA rationalizes its policy of "*full* union dues" as

> avoid[ing] the substantial expense entailed in determining each year what portion of the union's expenditures are devoted to activities germane to the union's role as exclusive representative and what portion goes for other activities.[124]

Of course, this avails CWA nothing (whatever its relevance to other unions), in as much as CWA already must bear such "expense" to satisfy its burden of proof where it represents employees under the RLA or various state public-sector compulsory-bargaining laws.[125] Moreover, once again, the contention begs the question. Because Section 8(a)(3) affirmatively limits compulsory "dues" and "fees" to that portion of a union's expenditures devoted to its role as exclusive representative, CWA must justify its exactions through a verified *pre*-collection notice, and *post*-collection proofs.[126] That this justification is not costless hardly counsels abandonment of statutory strictures. Congress did not say in Section 8(a)(3)—and certainly the First and Fifth Amendments do not say—that an exclusive representative may extract *un*limited "dues" and "fees" if it simply whines that proving any entitlement entails "substantial expense". For "adminis-

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[124] *Id.* at 47. [125] *See ante* note 90.

[126] *See* Chicago Teachers Union, Local No. 1 v. Hudson, ____ U.S. ____, 106 U.S. 1066 (1986).

trative convenience alone is insufficient to make valid what otherwise is a violation of due process of law".[127]

*3. **Bad-faith conduct.*** CWA also denies "any basis for believing" that its policy of demanding "*full* union dues" "was animated by 'bad faith' * * * by using the funds * * * to engage in the range of activities 'regularly engaged in by modern unions,' * * * including activities * * * not strictly part of the union's role as bargaining representative narrowly defined". [128] But this very statement belies its innocence, admitting *sotto voce* it always knew it was expending compulsory "dues" and "fees" on activities *outside* its Section 9(a) authority—what it calls its "role as bargaining representative *narrowly defined*", that is, *as defined by law.*

Because the discrimination in this case is crystal clear, no specific proof of CWA's intent is necessary.[129] But, overall, the record exposes CWA's contempt for its statutory—let alone its constitutional—duties, in the teeth of the language and purpose of the act and of this Court's admonitions in *Steele*, *Hanson*, *Street*, *Abood*, *Ellis*, and numerous other cases. CWA admits it spent the Employees' "dues" and "fees" on activities outside Section 9(a)—and the District Court so found, to the extent of nearly four-fifths of the collections. CWA admits it maintained no records apportioning its costs between "collective-bargaining" and other activities[130]—and, rather than correcting this deficiency by establishing such an accounting-system, now proposes to meet its burden of proof through superimposition on its

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[127] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 647 (1974). *See* Ellis, 466 U.S. at 444.

[128] BP at 46.

[129] *See* Radio Officers' Union, 347 U.S. at 44-52.

[130] Even CWA's own accountant described the task of sorting out its "collective-bargaining" costs as equivalent to trying to make a "frog fly". Appendix to Petition for a Writ of Certiorari in No. 86-637, at 253a.

present, inadequate accounts of a new, complex, and untested scheme of "statistical sampling", verification of which demands burdensome oversight by experts retained by the Employees. And CWA admits it charged all individuals in the bargaining-unit the same "*full* union dues", although it knew that nonunion employees and voluntary union members received unequal services, and that its inadequate records evidenced "collective-bargaining" costs of only about one-fifth of the "dues" and "fees" collected.

For CWA to call its behaviour unintentional defies common sense and its own concessions. That its discrimination was severe the disproportion between the amount charged (nearly 100% of "*full* union dues") and the amount proven proper (only about one-fifth of "*full* dues") establishes. And that its discrimination was unrelated to—indeed, contradictory of—legitimate Section 9(a) objectives CWA itself brazenly admits, describing its activities as "not strictly part of [its] role as bargaining representative *narrowly defined*". This suffices to show "bad faith" as a matter of law.

4. Usurpatory conduct. Finally, CWA touches the heart of the problem when it denies "there is any basis for concluding that a union breaches its duty of fair representation by expending dues money for activities beyond direct collective bargaining narrowly defined".[131] Yet a duty to represent employees fairly with respect to statutorily defined activities necessarily implies a duty not to pretend to represent them otherwise. For an assertion of non-existent representational powers is always "unfair", discriminatory, and arbitrary; and, in paradigmatic cases such as this one, inferentially motivated by bad faith, too. Or, *usurpation of Section 9(a) authority is a* per se *violation of the duty of fair representation.*

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[131] BP at 47.

In sum, the record exhibits a classic violation of the duty of fair representation. And, as the parties, the United States, and this Court agree, a case bottomed on the duty of fair representation lies outside the Board's "primary jurisdiction".[132]

B. Congress excluded 8(a)(3)-agreements from the "primary jurisdiction" of the Board; and the courts should exercise concurrent jurisdiction to define limits on such agreements, in order to avoid conflicting standards under the National Labor Relations Act, the Railway Labor Act, and numerous public-sector collective-bargaining statutes.

"Primary jurisdiction" is also inapplicable here for two, perhaps more fundamental, reasons inherent in that doctrine itself.

1. The intent of Congress. *Garmon* "does not state a constitutional principle", but reflects a determination of congressional intent as to which tribunal—the Board or the courts—should address a problem "in the field of labor relations". "The purpose of Congress is the ultimate touchstone."[133]

Where (as here) 8(a)(3)-agreements are concerned, Congress *never* "pre-empted" legislative and judicial oversight by the States, but instead always encouraged a policing role for them independent from, if not actually superior to, that of the Board.[134] Because "the agreements requiring 'membership' in a labor union which are expressly permitted by the proviso [tc Section 8(a)(3)] are the same 'membership' agreements expressly placed within the reach of state law

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[132] Vaca, 386 U.S. at 176-88.

[133] Local 1625, Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963).

[134] *Id.* at 102-05.

by [NLRA] § 14(b)";[135] and because Congress intended the legality of those agreements not to be within the exclusive jurisdiction of the Board as against *state* authorities; it would be anomalous to oust the *national* courts of jurisdiction over the very subject-matter that Congress has determined requires no pre-emptive commitment to the Board.

2. Uniform substantive law. *Garmon* finds a "primary justification" in "the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to" the Board.[136] Where (as here) 8(a)(3)-agreements are concerned, however, conceding "primary jurisdiction" to the Board will promote, not avoid, conflict. For the substantive law of such agreements under the RLA and public-sector compulsory-bargaining acts already lies within the courts' exclusive jurisdiction, under *Hanson*, *Street*, and *Ellis* (RLA) and *Abood* and *Hudson* (public-sector statutes). And as this Court explained in *Abood*, after broadly surveying the issue in both private and public-employment,

> [t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights [of non-union employees] * * * "[t]he union security issue in the public sector . . . is fundamentally the same issue . . . as in the private sector * * * ."[137]

Thus, because Section 8(a)(3) is equivalent to Section 2, Eleventh and similar public-sector provisions, the final authorities on the subject must be the judiciary. No room exists for the Board to assert an independent rule-making role when its decisions must conform to judicial mandates

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[135] Local 1625, Retail Clerks v. Schermerhorn, 373 U.S. 746, 751 (1963).

[136] Vaca, 386 U.S. at 180-81.

[137] 431 U.S. at 232.

under the RLA and public-sector laws. Therefore, a compelling reason exists for rejecting the *Garmon* doctrine altogether as to 8(a)(3)-agreements.

C. An appropriate remedy for violations of Sections 8(a)(3) and 9(a) such as found here could include arbitration, to which Congress did not intend the Board's "primary jurisdiction" to apply, and under which circumstances the Board itself would defer to the arbitral forum.

In *Chicago Teachers Union, Local No. 1* v. *Hudson*, this Court suggested that "an expeditious arbitration might satisfy" First- and Fourteenth-Amendment due-process requirements in a compulsory-union-fee case.[138] If (as the Employees urge in their cross-petition) *Hudson* applies to the NLRA, then another powerful legal-*cum*-practical consideration militates against the "primary-jurisdiction" doctrine.

Congress has unequivocally endorsed arbitration of labor disputes, notwithstanding that controversies arguably raising "unfair-labor-practice" issues may be adjudicated in fora other than the Board.[139] And this Court has held that the congressional policy favoring arbitration outweighs considerations supporting "primary jurisdiction".[140] Moreover, although the Board has jurisdiction over "unfair labor practices" arguably subject to arbitration under collective-bargaining agreements,[141] it sustains arbitral awards where the arbitrators consider the alleged "unfair labor practi-

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[138] ____ U.S. at ____ n.21, 106 S. Ct. at 1077 n.21.

[139] 29 U.S.C. § 173(d). *See* Steelworkers v. American Mfg. Co., 363 U.S. 564, 566-68 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

[140] Carey v. Westinghouse Electric Corp., 375 U.S. 261, 272 (1964).

[141] NLRB v. Strong, 393 U.S. 357, 360-61 (1969).

ces";[142] and defers to awards not clearly repugnant to the NLRA.[143] Thus, no one—not Congress, this Court, or the Board—considers "primary jurisdiction" appropriate in the arbitral context.

In short, because arbitration is a possibly preferred remedy in cases such as this, *Garmon* is inapplicable.

D. If violations of Sections 8(a)(3) and 9(a) such as that found here are within the "primary jurisdiction" of the Board, and therefore subject to the supposedly "unreviewable" discretion of its General Counsel, this Court must now decide the constitutional issues of exclusive representation avoided in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944).

The final, decisive consideration against "primary jurisdiction" is constitutional. As *Vaca* v. *Sipes* explained, were "primary jurisdiction" to obtain in duty-of-fair-representation cases,

> the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint. * * * The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine.[144]

But, were the "basic purposes" of the duty of fair representation frustrated, constitutional issues would unavoidably come to the fore. For *Steele* warned that

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[142] *E.g.*, Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955); International Harvester Co., 138 N.L.R.B. 923 (1962).

[143] *E.g.*, Virginia-Carolina Freight Lines, 155 N.L.R.B. 447 (1965).

[144] 386 U.S. at 182-83.

> [i]n the absence of any available administrative remedy, the right * * * to a remedy for breach of the * * * duty of the bargaining representative * * * would be sacrificed or obliterated if it were without the remedy which courts can give * * * and which it is their duty to give in cases in which they have jurisdiction.[145]

And, if the duty did not exist—originally, or because a remedy for its breach did not exist, or because the courts lacked jurisdiction to offer that remedy "[i]n the absence of any available administrative remedy"—"constitutional questions [would] arise" as to the legitimacy of exclusive representation.[146]

The Employees doubt (and this Court has never held) that the General Counsel of the Board could have "*unreviewable* discretion" under our Constitution to extinguish fundamental employee rights by capriciously denying remedies for their violation. However, if this Court should hold that "primary jurisdiction" attaches to illegal 8(a)(3)-agreements, it will perforce of *Steele* be required to decide two interrelated constitutional questions of the utmost gravity: namely, (i) whether the asserted "unreviewable discretion" of the General Counsel can coexist with the Constitution; and (ii) if such "unreviewable discretion" is constitutional, whether Section 9(a) is therefore unconstitutional.[147]

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[145] 323 U.S. at 207.

[146] *Id.* at 198-99.

[147] *Compare* Carter, 298 U.S. at 311 (opinion of the Court), 318 (Hughes, C.J., concurring), *and* Schechter Poultry Corp., 295 U.S. at 537, *with* Jones & Laughlin Steel Corp., 301 U.S. at 45, *and* Virginian Railway, 300 U.S. at 548-49, *in the light of* J. Gross, *ante* note 9, at 187.

CONCLUSION

For the foregoing reasons, the Employees pray that this Court affirm the decision of the Court of Appeals.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

COMMUNICATIONS WORKERS OF AMERICA, *et al.*,
Petitioners,

v.

HARRY E. BECK, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

It is useful to begin by placing the issues posed here in the broader context within which those issues arise.

In our legal system, absent a statutory prohibition, private parties are generally free to contract on the terms they desire, and to establish conditions on their willingness to enter into further contracts with third persons. This rule applies to the realm of employment contracts no less than to other contract realms. Thus, absent statutory constraints, an employer may, for example, condition his willingness to enter into employment contracts with would-be-employees on the employees' agreement to support a church or charity of the employer's choosing, and the employer likewise may enter into a contract with the church or charity obligating the employer to place that condition on any employment contracts into which the employer enters. *Cf. Church of Jesus Christ of Latter-Day Saints v. Amos*, —— U.S. ——, 55 L.W. 5005 (June 24, 1987).

The agreements at issue here are of this latter type: the employers have agreed with petitioners Communications Workers of America *et al.* ("the Union") not to retain in their employ individuals who fail to pay dues to the Union. So far as the record indicates, those agreements were voluntarily entered into and the employers are prepared to abide by their terms. The questions posed here are whether such "union shop" agreements violate either federal statutory or constitutional law.

Prior to the enactment of the National Labor Relations Act of 1935, the answer to that question would have been self-evident. As of that time there was no federal law law addressed to, and no conceivable basis for applying constitutional strictures to, such private agreements. And under the black letter common law of contracts of the time, the basic rule was that not only union shop agreements but also "closed-shop" agreements, obligating the employer to hire only union members, were both law-

ful and legally enforceable.[1] And, under that law employers and unions were likewise free to enter into enforceable contracts in which the employer recognized the union as the exclusive representative of his employees and agreed not to negotiate with his employees individually.[2]

The NLRA thus did not *grant* unions the power to negotiate union security agreements; rather that Act *conditioned* this preexisting freedom by prohibiting such agreements when entered into by a minority union or a company-dominated union. Congress decided in 1935 to otherwise "preserve the status quo as to the legality of closed shop agreements under the common law in the different States." 2 Legislative History of the National Labor Relations Act of 1935 at 2335 (Sen. Wagner). To make its intent in this regard explicit, Congress enacted a proviso to § 8(3) excepting such agreements from the general prohibition of discrimination based on union membership. *See* Pet. Br. at 24-25.[3] Then in the Labor Man-

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[1] *See, e.g., Mississippi Theatres Corp. v. Hattiesburg Local Union No. 615*, 174 Miss. 439, 164 So. 887 (1936); *Harper v. Electrical Workers Local 520*, 48 S.W.2d 1033 (Tex. Civ. App. 1932); *Ribner v. Rasco Butter & Egg Co.*, 135 Misc. 616, 238 N.Y.Supp. 132 (1929); *Jacobs v. Cohen*, 183 N.Y. 207, 76 N.E. 5 (1905). *See generally* 1 Teller, The Law Governing Labor Disputes and Collective Bargaining § 170 (1940); Despres, *The Collective Agreement for the Union Shop*, 7 U. Chi. L. Rev. 24, 31-44 (1939); Restatement of Contracts (First) § 515(c), illustration 18 (1932).

[2] *See, e.g., Ribner v. Rosco Butter & Egg Co., supra*, 238 N.Y. Supp. at 135; *Goldman v. Cohen*, 22 App. Div. 631, 227 N.Y.Supp. 311, 314 (1928).

Even where unions did not enjoy the status of exclusive representative by contract, a union could attain that status *de facto* by securing a closed shop agreement and by then exercising its authority over its members to discipline any member who attempted to work on terms other than those agreed to by the union. *See* 1 Teller, *supra*, at 289-90; Despres, *supra*, 7 U. Chi. L. Rev. at 35-36.

[3] Plaintiffs cite a number of cases to show that the courts, in formulating the pre-1935 common law, sought "to reconcile collective agreements with individual employment contracts." Resp. Br. at 6. But the cases plaintiffs cite concerned the extent to which

agement Relations Act of 1947 Congress went further, denying unions and employers their common-law freedom to enter into closed shop agreements and leaving only the freedom to enter into union shop agreements.

The questions presented here are whether, by placing the federal limitations just stated on union-employer agreements that impose contractual conditions on whom the employer will employ, Congress somehow either (1) proscribed agreements conditioning continued employment on the tender of full union dues; or (2) injected governmental action into such agreements so as to implicate constitutional concerns. As we proceed to show, respondents' effort to establish that those two questions should be answered in the affirmative is wholly unavailing.

I. THE § 8(a)(3) ISSUE

Plaintiffs concede that the provisos to NLRA § 8(a)(3) in so many words permit union security agreements providing that the employees in a represented bargaining unit are to tender to their union representative an amount equal to " 'dues' and 'fees' " as a condition of continued employment. *See* Resp. Br. at 17-18. But plaintiffs contend that the statutory words leave open the "question of what Congress meant by the words 'dues' and 'fees,' " *id.* at 17 n.60, and in particular whether " 'dues' and 'fees' in Section 8(a)(3) refer to whatever a union

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collective agreements were enforceable by, or as against, *individual employees*. As plaintiffs correctly note, in that context the courts "did develop [a number of] theories" of enforceability. *See* Resp. Br. at 6-8; *see also Harper v. Electrical Workers Local 520, supra*, 48 S.W. 2d at 1039-40, where the various theories are reviewed. That question is entirely distinct from the question of whether promises made by an employer to a union—such as a promise to hire only union members—is enforceable by the union as against the *employer*. On this latter question—the only one of relevance here—the law was clear. As the 1935 Congress correctly understood, the basic common law rule was that employers and unions that wished to do so were free to enter into, and abide by, closed shop and other union security agreements without securing the consent of "objecting employees" and without violating any of the rights of such employees.

charges its voluntary members for its institutional activities . . . that is, 'full union dues,' " *id.* at 17-18. And plaintiffs reach the remarkable conclusion that "[i]rrespective" of whether union security agreements between private parties in an industry regulated by the NLRA are "infus[ed]" with " 'governmental action,' " the words "dues and fees" when "read in light of [§ 8(a)(3)'s] legislative purpose" are "most reasonabl[y]" read to refer not to the periodic amount a union charges its voluntary members but to the *portion* of that amount that the union expends on "statutory collective bargaining." *Id.* at 17, 40.

In responding to plaintiffs' argument, we put to one side the implausibility as a matter of simple English usage of reading the word "dues" (or "fees") to refer to a portion of the amount paid as such by union members as a condition of continued membership. For plaintiffs' argument suffers from far more fundamental flaws: that argument flies in the face of (A) the statutory language of § 8(a)(3); (B) the legislative history of that section; and (C) this Court's decisions interpreting the section.

A. In their exegesis on § 8(a)(3), plaintiffs look to the words of NLRA §§ 2(5), 7, 8(d) & 9(a), *see* Resp. Br. at 19-20; the one place plaintiffs do *not* look is to the words of § 8(a)(3) itself. Indeed, plaintiffs conveniently refrain from quoting § 8(a)(3) in full at any point in their brief.[4]

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[4] Plaintiffs also misread the provisions cited in their brief in contending that under the Act a union represents bargaining-unit employees "only with respect to . . . Section 9(a) concerns," and engages in "*extra*-statutory actions," in engaging in activities other than bargaining over the mandatory bargaining subjects delineated in §§ 9(a) & 8(d). Resp. Br. at 39-40 (emphasis in original). "Labor organization" is defined in § 2(5) as "any organization . . . which exists for the purpose, in whole *or in part*, of dealing with employers . . ."; far from being "intentionally narrow," Resp. Br. at 19, the definition "is phrased very broadly." S. Rep. No. 573, 74th Cong., 1st Sess. at 7 (1935), in recognition of the multiple activities in which unions engage. And in enacting

Plaintiffs' omission is surely understandable—if not forgivable—for the language of § 8(a)(3) simply does not leave room for the ambiguity that plaintiffs first posit and then purport to resolve. Contrary to the impression plaintiffs attempt to leave, § 8(a)(3) does not speak of "dues" or "fees" that bargaining unit employees covered by a union security agreement may be required to tender to their union representative, rather, the section speaks of (and only of) "the periodic dues and the initiation fees *uniformly required as a condition of acquiring or retaining membership.*" Thus, the section, in terms, defines "dues" and "fees" (or more precisely "periodic dues" and "initiation fees") as those dues and fees "uniformly required" of all members, *viz.*, as the "full dues" paid by "voluntary members" and *not* as a portion of full dues.

B. Plaintiffs' proposed construction of § 8(a)(3) is equally at war with the statutory history.

(1) To begin with, plaintiffs' fundamental theory is wholly ahistoric. Plaintiffs argue that because "only a Section 9(a) representative may compel payments from nonunion employees" and because under § 9(a) an exclusive union representative "may compel [nonunion] employees to accept its decisions only as to 'collective bargaining,'" it follows that the § 8(a)(3) provisos permitting union security agreements must "limit the representative's use of those payments to 'collective bargaining,' too." Resp. Br. at 20. Plaintiffs' conclusion in that regard is refuted by the simple fact that it was the *1935 Congress*—and not the 1947 Congress—that determined to exempt from federal prohibition only union security agreements between employers and § 9(a) rep-

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§ 7, Congress chose "to protect concerted activities for the somewhat broader purpose of mutual aid or protection as well as for the narrower purposes of self-organization and collective bargaining." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). As *Eastex* illustrates, all employees in a bargaining unit benefit from "concerted activities for . . . mutual aid or protection" whether or not those activities take the "narrower" form of "collective bargaining."

resentatives. And under the 1935 Act, the condition that only a § 9(a) representative may enter into a union security agreement clearly was *not* intended to invalidate an agreement providing for the payment of full union dues; the 1935 Act allowed agreements for the *closed* shop, whereby the covered employees were required to comply with *all* the conditions of union membership, including all financial obligations, *without limitation*.[5] Thus, the fact that under the NLRA only a § 9(a) representative may enter into a union security agreement does not permit—let alone require—the inference that the representative's expenditures of moneys received pursuant to such agreement are limited by § 9(a).

(2) More generally, the legislative debates concerning § 8(a)(3) in 1947, when that section assumed its present form, refute plaintiffs' claim that Congress intended to prohibit union security agreements that require the tender of full union dues. We devoted seventeen pages of our opening brief to tracing § 8(a)(3)'s evolution step-by-step. *See* Pet. Br. at 23-40. Plaintiffs dismiss that review in a single footnote, stating that "CWA dilates on 'legislative history' . . . [b]ut this history begs the question of what Congress meant by the words 'dues' and 'fees.' ". Resp. Br. at 18 n.60. And then, in a two-page section of their brief containing only a single citation to the legislative materials, *see id.* at 21-22, plaintiffs contend that their reading of the statute "find[s] vindication in the overriding congressional purpose underlying

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[5] It is interesting to note that in the evolution of the Wagner Act the permission for closed-shop agreements predated the grant to majority representatives of the status of exclusive representative. Thus, in 1934, the Senate Labor Committee reported out a predecessor of the Wagner Act, which permitted union shop agreements "if the agreement is sought by the majority of employees in the unit covered by it when made" but which left it for the NLRB to decide, in its discretion, whether "representatives agreed upon by the majority of employees in an appropriate unit shall represent the entire unit for the purpose of § 10(a)." 1 Legislative History of the National Labor Relations Act of 1935 at 1087-88.

the Section 8(a)(3) provisos: namely, to eliminate so-called 'free-riders,'" *id.* at 21. Plaintiffs misunderstand the legislative materials.

To begin with, the legislative history which plaintiffs so cavalierly dismiss demonstrates that the § 8(a)(3) provisos were shaped by a complex of concerns and *not*, as plaintiffs would have it, by a single-minded focus on free-riding. While the free-rider concern was a significant one, the proponents of the provisos were at least equally animated by a second object: maintaining industrial peace and stability in the circumstances of the time. As Senator Taft put it: "because the union shop has been in force in many industries for so many years . . . to upset it today probably would destroy relationships of long standing and probably would bring on more strikes than it would cure." 2 Legislative History of the Labor Management Relations Act of 1947 at 1010 ("LMRA Leg. Hist."). And the proponents also sought to assure that under the law Congress crafted, the amount owed by nonmembers would be "readily ascertainable" so as not to require employers or the government "to inquire into the internal affairs of the union." S. Rep. No. 105, 80th Cong., 2d Sess. at 20 (1947); *see* Pet. Br. at 29, 35-36, 38.

These intensely practical concerns were in turn reinforced by a recognition of the political realities confronting those who were seeking to place some restrictions on the range of union security agreements permitted by federal law as of 1947; such legislation faced a "predictable presidential veto," *Pipefitters v. United States*, 407 U.S. 385, 409 (1972), and thus would need the support of two-thirds of the closely-divided Senate if the veto were to be overriden. That reality—as well as (or, perhaps, without regard to) their views as to the ultimate merits of union security agreements—led Senator Taft and his allies to conclude that "it would be a mistake to go to the extreme of absolutely outlawing a contract which provides for a union shop" and instead to adopt the approach "of dealing with the abuses which had

appeared" in the broad range of permissible union security agreements as of 1947. 2 LMRA Leg. Hist. at 1420. *See also, e.g.*, 2 *id.* at 1061, 1077 (Sen. Ellender). And the only such abuses Senator Taft and his colleagues perceived (or chose to address) concerned the union power to arbitrarily or discriminatorily exclude from employment individuals who were willing to pay the applicable union dues. *See* Pet. Br. at 30-31. For this reason alone the legislative history cannot be read as showing a congressional intent to invalidate the standard union shop agreement that calls for the tender of full union dues.

Moreover, to the extent that § 8(a)(3) was shaped by the 1947 Congress' concern over the free-rider problem, the legislative materials make it plain that Congress saw the problem, and its solution, quite differently than do plaintiffs. Thus, for example, in introducing the Senate Committee bill on the floor, Senator Taft stated that "what we do, in effect, is to say that no one can get a free ride," and then Senator Taft immediately went on to explain that what § 8(a)(3) provides in that regard is that "[t]he employee has to pay *the union dues.*" 2 LMRA Leg. Hist. at 1010 (emphasis added). And later in the debates Senator Taft made even more explicit what could be required of all employees in a bargaining unit: to "*pay the same dues as other members of the union.*" 2 *Id.* at 1142.[6] In short, § 8(a)(3)'s legislative history shows that Congress meant precisely what the plain words of the provision say: "dues" means those sums "uniformly required [by the union representative] as a condition of acquiring or retaining membership."

(3) Plaintiffs attempt to find comfort in the fact that, as we explained in our opening brief, the legislative materials show that § 8(a)(3) was modeled after the "Rand Formula." *See* Pet. Br. at 33-34; Resp. Br. at 21-22.

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[6] *See also* Pet. Br. at 26 (quoting House Labor Committee Report), 27-28 (quoting House debates), 29 (quoting Senate Labor Committee Report), 30-33 (quoting Senate debates), 34-35 (quoting House conference report).

Plaintiffs state that "[t]he 'Rand Formula' . . . unequivocally applied the 'free-rider' thesis" and thus "amounts to a precursor of the 'test' this Court adopted under Section 2, Fourth and 2, Eleventh of the [Railway Labor Act]." Resp. Br. at 21-22. Plaintiffs could not be more mistaken.

In fashioning a union security provision for the parties in an interest arbitration, Justice Rand concluded that "[i]t is irrelevant to try to measure benefits in a particular case; the protection of organized labor is premised as a necessary security to the body of employees." *Ford Motor Co. of Canada*, 1 BNA Lab. Arb. 439, 444 (1946). Thus, Justice Rand entered an award requiring all employees in the bargaining unit to pay "such sum as may from time to time be assessed by the union on its members according to its constitution"; Justice Rand defended this requirement on the ground that "*the dues* are only those which members are satisfied to pay for substantially the same benefits, and as any employee can join the union . . . I see no serious objection in this circumstance." *Id.* at 445 (emphasis added).[7]

(4) Plaintiffs end up placing their principal reliance on amendments to the Railway Labor Act ("RLA"), which were enacted in 1951, four years *after* the LMRA. Plaintiffs contend that the 1951 Congress intended those amendments to have the same meaning as NLRA § 8(a)(3); from that premise plaintiffs argue that this

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[7] While requiring nonmembers to pay the full amount of periodic union dues, Justice Rand determined not to require nonmembers to pay "any entrance fee" or any "special assessment or . . . an increment in an assessment which relates to special union benefits such as, for instance, union insurance, in which the nonmember employee as such would not participate for the benefit of which he would not enjoy." 1 BNA Lab. Arb. 445-46; *see also* Dudra, *Approaches to Union Security in Switzerland, Canada and Columbia*, 86 Monthly Lab. Rev. 136, 138 (1963). Congress, in crafting § 8(a)(3), decided to depart from the Rand formula in one respect: § 8(a)(3) *does* permit union security agreements which require nonmembers to pay "initiation fees."

Court's interpretation of RLA § 2, Eleventh in *Machinists v. Street*, 367 U.S. 740 (1961), should control the meaning of NLRA § 8(a)(3) as well. Plaintiffs' argument fails at each step in its progression.[8]

(a) To begin with, plaintiffs are wrong in asserting that the "linguistic parallel" between NLRA § 8(a)(3) and RLA § 2, Eleventh is "exact." Resp. Br. at 24. RLA § 2, Eleventh permits union security agreements that provide for the payment of "assessments" (as well as of dues and initiation fees); RLA § 2, Eleventh applies "[n]otwithstanding . . . any other statute or law . . . of any State"; and RLA § 2, Eleventh allows certain classes of railroad employees to satisfy their obligations under union security agreements by belonging to a labor organization other than the one that represents them. In each of these respects, NLRA § 8(a)(3) is precisely to the contrary. *See also* Pet. App. 97a (Winter, J., dissenting).

More importantly, contrary to plaintiffs' assertion the two statutes do not "reflect[] an identity of purpose." Resp. Br. at 26. Plaintiffs' characterization of RLA § 2, Eleventh as "animated" by the "limited purpose" of "address[ing] . . . the 'free-rider' issue," Resp. Br. at 24, is fair enough given the situation that informed that section's enactment: prior to 1951 the "railway industry [was] marked . . . by a strong and long-standing tradition of voluntary unionism . . . [and] by . . . a congressional policy of complete freedom of choice . . . to join or not to join a union" and the 1951 amendments were intended as an "inroad[]" on "the policy of full freedom

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[8] Plaintiffs' argument necessarily assumes that the 1951 Congress understood § 2, Eleventh as that section was ultimately construed in *Street*. But that is by no means certain; *Street*'s construction, while "entirely reasonable" as a means of avoiding "constitutional questions . . . of the utmost gravity," 367 U.S. at 749-50, nonetheless was "not without its difficulties" and was adopted "precisely to avoid the constitutional issues presented," *Abood v. Detroit Board of Education*, 431 U.S. 209, 232 (1977). For purposes of the discussion that follows, however, we indulge plaintiffs' assumption.

of choice" for the "limited purpose of eliminating the problems created by the 'free rider.'" *Street*, 367 U.S. at 750, 767; *see* Pet. Br. at 41-42. But as we have seen the 1947 amendments to NLRA § 8(a)(3) cannot be so characterized: prior to 1947 the NLRA *permitted* all forms of union security agreements as a matter of federal law (including closed shops), and the 1947 amendments (to paraphrase *Street*) were enacted for the limited purpose of eliminating the abuses concerning direct union interference with employment that had arisen in closed shops. Pp. 6-8, *supra*. Thus, in their genesis and in their purposes, RLA § 2, Eleventh and NLRA § 8(a)(3) are *not*, as plaintiffs' claim, "parallel" and do *not* call for identical interpretations.

(b) Plaintiffs contend that statements in the legislative history of the 1951 amendments to RLA § 2, Eleventh show that the 1951 Congress viewed those amendments as "identical" to the amendments that had been made to NLRA § 8(a)(3) in 1947. But even if that were true, its only possible relevance in this case would be to evidence the 1951 Congress' understanding of a statute *the 1951 Congress did not enact*. The relevant question here, however, is what the 1947 Congress intended by the statute that *the 1947 Congress enacted*. And "it is well settled that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Russello v. United States*, 464 U.S. 16, 26 (& cases cited therein) (1984).

Plaintiffs moreover misstate what was said about NLRA § 8(a)(3) when RLA § 2, Eleventh was amended in 1951. Plaintiffs' argument depends on taking a phrase of Senator Taft's out of context and asserting that the Senator "characterized" the provisions of RLA § 2, Eleventh as "'*identical* with the Taft-Hartley law.'" Resp. Br. at 26 (emphasis supplied by respondents). But Senator Taft's floor statement, from which respondents quote selectively, begins as follows: "In effect, the bill inserts in the railway mediation law *almost the exact provisions, so*

far as they fit, of the Taft-Hartley law, so that the conditions regarding the union shop and the check-off are carried into the relations between railroad unions and the railroads." 96 Cong. Rec. 16267 (1950) (emphasis added). Senator Taft then went on to explain that he had "objected to some of the original terms of the bill" but that "when the proponents agreed to accept amendments which made the provisions identical with the Taft-Hartley law, I was willing to concur in those amendments." *Id.*[9] Thus, the referent of "provisions" in Senator Taft's statement is not § 2, Eleventh as a whole but the particular elements (or "provisions") of § 2, Eleventh to which Senator Taft had objected and which in deference to his objection had been subjected to narrowing amendments. Indeed, Senator Taft immediately thereafter acknowledged, in a colloquy with Senator Holland, that he "did not intend . . . to give the impression that [§ 2, Eleventh] would . . . contain the provision of the Taft-Hartley law [NLRA § 14(b)] respecting and giving effect to the ["right-to-work"] provisions of the State constitutions and States statutes." *Id.*

C. Given the clarity of § 8(a)(3)'s language and history—and given the irrelevance of decisions under RLA § 2, Eleventh—it is not at all surprising that two years after *Street*, this Court, in a case arising under NLRA § 8(a)(3), approved a union security proposal that would have conditioned employment "upon the payment of sums equal to the initiation fees and regular monthly dues paid by the union members." *NLRB v. General Motors Corp.*, 373 U.S. 734, 736 (1963). And, in a companion case decided the same day as *General Motors*, the

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[9] The amendments to the bill to which Senator Taft referred provided first, that nonmembers shall not be required to pay "fines and penalties"; second, that nonmembers shall not be required to pay dues to more than one labor organization; and third, that employers shall not deduct union dues from employees' pay absent a written authorization from the employee. *See* Legislative History of the Railway Labor Act, As Amended (1926 through 1966) at 1096-97, 1103, 1123, 1135-37.

Court, after explicitly recognizing that "dues collected from members may be used for a 'variety of purposes, in addition to meeting the union's costs of collective bargaining,'" held that an agreement requiring nonmembers to pay a "service fee [which] is admittedly the exact equal of membership initiation fees and monthly dues" is legally "the same as the *General Motors* . . . arrangement." *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 753-54 (1963). Thus, plaintiffs' proposed construction of § 8(a)(3) is not only contrary to the plain words and history of that section but also to this Court's prior understanding of the section.[10]

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[10] Plaintiffs acknowledge that the validity of their duty of fair representation ("dfr") claim rests on their statutory claim that "the only 'dues' permissible under § 8(a)(3) are the exclusive representative's cost of statutory 'collective bargaining,'" Resp. Br. at 41; *see also id.* at 37 part II, first sentence. Since we have met that statutory claim in text—and since plaintiffs discuss their dfr claim only in their "more detailed consideration" of the applicability of the preemption doctrine of *San Diego Unions v. Garmon*, 359 U.S. 236 (1958), Resp. Br. at 37, and the parties agree that *Garmon* is inapplicable to plaintiffs' dfr and constitutional claims—we treat separately with the duty of fair representation only in this footnote.

Plaintiffs' assertion that the Union's conduct here has "discriminatory effects," Resp. Br. 39, admittedly depends on their statutory premises that "Sections 8(a)(3) and 9(a) license CWA to extract from the Employees only [collective bargaining expenditures] by force of law," *id.* at 38-39. But as we have shown: (1) the dues payments specified in the union security agreement here are required not by "force of law" but by the agreement between the employer and the Union; and (2) the 1947 Congress determined in enacting § 8(a)(3) that these parties are permitted to negotiate agreements which provide that bargaining unit employees are to pay full union dues, not merely the moneys necessary to cover "collective bargaining expenditures" narrowly defined. In arguing that by requiring the equal payment of union dues the Union "discriminates" against them in favor of "voluntary members", plaintiffs err also because in permitting unions and employers to agree on such a requirement, Congress necessarily contemplated, and accepted, that the payment would be "involuntary" as to some employees of some employers. And Congress nonetheless determined that "nothing in this Act or any other statute of the United States shall preclude such agreements," and thus that as long as the monetary obligation

II. THE GOVERNMENTAL ACTION ISSUE

In the lower courts plaintiffs' main "government action" theory was that "the statutory authorization of the agency shop clause was sufficient state action to subject the union's expenditures . . . to constitutional scrutiny" and plaintiffs claimed to derive that theory from *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956).[11] In *Hanson*, however, this Court found state action not because union security agreements are authorized by the RLA but because, under the RLA—in contrast to the situation under NLRA § 14(b)—such agreements supersede any contrary state law and in that sense have the force of federal law. *See* Pet. Br. at 19-21.

Belatedly recognizing as much, plaintiffs now abandon their "authorization" theory and their reliance on *Hanson*; indeed plaintiffs now state that "[e]xplication of *Hanson*'s shadowy verbiage is not worthwhile," but that *Hanson* does not "preclude the discovery of *other* bases

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is uniform, any difference in "effects" between "voluntary" and "involuntary" dues payors does not make out a claim of unlawful discrimination under any federal law.

In arguing that the Union breached its duty of fair representation here, plaintiffs state repeatedly that only 19% of the dues and fees received by the Unions were spent for collective bargaining. Resp. Br. at 39, 41, 52. While the point is irrelevant to the legal issue before the Court, we note that plaintiffs misstate what "the record emphasizes," *id.* at 39. The Special Master found that because the Union did not separately account for collective bargaining expenditures, the Union was able to prove by "clear and convincing evidence" collective bargaining expenditures that amount to only 19% of total expenditures. Pet. App. at 120a-123a. These findings were *vacated* by the court of appeals because the "special master erred in his standard of proof," *id.* at 74a, and the court below could not determine to what extent this error infected the master's conclusions, *id.* at 79a-80a.

[11] The quotation in text comes from the Brief in Response to Appellants/Cross-Appellees and in Support of Cross-Appeal in C.A. 4 Nos. 83-1955, 83-1956, at 21. In that brief, plaintiffs cited *Hanson* on every other page of the section headed "Supreme Court Precedent" and plaintiffs quoted extensively from that decision. *See id.* at 17-23.

for finding 'governmental action.'" Resp. Br. at 11 n.42 (emphasis in original). And plaintiffs now claim that "'[g]overnment action arises from [the union's] section § 9(a) status as the employees' exclusive representative," *id.* at 16, and from the "special legal powers and privileges" that flow from that status, *id.* at 5. That theory runs contrary to at least two decades of this Court's percedents.[12]

A. In arguing that "'[g]overnment action arises from [the Union's] Section 9(a) status," plaintiffs necessarily contend that every provision in every collective bargaining agreement negotiated by an exclusive representative is equally subject to constitutional constraints. Yet, as Justice Powell observed in his concurring opinion in *Abood*, this Court "has wisely refrained from adopting

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[12] Plaintiffs address the governmental action issue as a predicate to their contention that the Court should adopt a "limiting construction" of § 8(a)(3) "in order to avoid constitutional issues" and their alternative contention that the Court should find §§ 8(a)(3) & 9(a) unconstitutional. *See* Resp. Br. at 3. As plaintiffs thus acknowledge, the policy of construing statutes to avoid constitutional questions if "a construction of the statute is fairly possible by which the constitutional question can be avoided," *Crowell v. Benson*, 285 U.S. 22, 62 (1932), is implicated here only upon a showing that state action *exists*, and not merely because a state action question is raised. That "policy's ultimate functions," the Court has explained, "are found in the delicacy of th[e] function [of judicial review of governmental action for constitutionality], particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; [and] the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority . . ." *Rescue Army v. Municipal Court*, 331 U.S. 549, 571 (1947). Decision of a state action question on the merits does not, in and of itself, put the constitutionality of the statute in doubt, nor does the resolution of such a question result in any of the other "consequences" of great moment that flow from a decision as to the constitutionality of the law. Moreover, if the presence of a lurking state action issue were sufficient to trigger the doctrine of constitutional avoidance, that doctrine would be implicated in virtually every case, since any law which authorizes or regulates private conduct can be said to raise a "state action issue."

this view and generally has measured the rights and duties embodied in a collective bargaining agreement only against the limitations imposed by Congress" and *not* by the "limitations that the Constitution imposes on congressional enactments." 431 U.S. at 252 (concurring opinion). And in *Steelworkers v. Weber*, 443 U.S. 193, 200 (1979), the Court squarely concluded that a collectively bargained affirmative action plan "does not involve state action." [13]

Moreover, if the acts of exclusive representatives were deemed to be governmental acts because the government sanctions the union's authority to act as an exclusive representative where the conditions stated in the NLRA are satisfied, a host of other private actors would have to be viewed as state actors as well. Simply stated, labor unions are not the only private entities whose authority to act is in some sense traceable to the government, nor are the NLRA and RLA the only statutory schemes which displace an individual's theoretical right (or, more accurately, freedom) to negotiate individualized agree-

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[13] *See also Black v. Cutter Laboratories*, 351 U.S. 292, 298-99 (1956) (just cause provision in collective agreement did not raise a constitutional question with respect to discharge for membership in Communist Party); *cf. Steelworkers v. Sadlowski*, 457 U.S. 102, 121 n.16 (1982); *Communications Assn. v. Douds*, 339 U.S. 382, 402 (1950).

Plaintiffs suggest that in negating the existence of "state action" in *Weber* the Court referred only to action at the state level and left open the possibility of " 'governmental action' at the *national* level." Resp. Br. at 14 n.49 (emphasis in original). As we read *Weber*, the Court was using the phrase "state action" in its customary and generic sense as synonymous with governmental action. Plaintiffs also suggest that the Court's statement in *Weber* was dictum because no constitutional issue was raised therein. But in *Sadlowski*, where the plaintiffs most assuredly raised a constitutional claim, the Court treated *Weber* as authoritative with respect to the state action issue. And in *Firefighters v. Cleveland*, —— U.S. ——, 54 L.W. 5005, 5009 n.8 (July 2, 1986) the Court distinguished *Weber* precisely on the ground that "Unlike *Weber* which involved a private employer this case [*Firefighters*] involves a public employer whose voluntary actions are subject to the strictures of the Fourteenth Amendment."

ments, yet this Court has found state action lacking in a host of analytically indistinguishable circumstances.

Thus, a state statute creating a regulated, but privately owned, monopoly to provide utility services confers "special legal powers and privileges," Resp. Br. at 5, on the monopoly and displaces the individual's opportunity to purchase the utility's services from another provider, yet *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1975), teaches that the actions of such monopolies do not constitute state action. And the grant by government of the exclusive right to license the use of certain terms by definition empowers the party granted that right, and correspondingly limits the freedom of others to use those terms, but the holder of the right is not thereby turned into a government agent subject to the Constitution. *San Francisco Arts & Athletics v. USOC*, —— U.S. ——, 55 L.W. 5061 (June 25, 1987). *See* Pet. Br. at 18-19.

Plaintiffs would wish away these cases on the ground that all arose "outside the peculiar area of labor relations." Resp. Br. at 15. But plaintiffs fail to show why for the purpose of the state action doctrine "labor relations" is a "peculiar" area. And the truth of the matter is that these cases are not the product of some random decisional process but are all governed by the same basic constitutional principle: congressional or state conferral of extensive powers upon private entities—even "monopoly" powers—does not make the actions such entities take of their own volition governmental action. That principle is fully applicable to the labor relations context and is fatal to plaintiffs' state action theory.

B. Plaintiffs base their entire governmental action argument on a single paragraph of dictum from *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, (1944), a decision that aside from that paragraph does not even mention the state action doctrine. Plaintiffs assert that "*Steele* fixes the locus of 'governmental action" in exclusive representation," Resp. Br. at 12, and is "the

controlling decision on the *quasi*-governmental nature of exclusive representation," *id.* at 5 (emphasis in original). Plaintiffs badly misread *Steele*.

Despite their professed indignation over our failure to discuss *Steele* in our opening brief, the fact of the matter is that plaintiffs themselves did not rely on *Steele* in their principal brief below; indeed, the decision plaintiffs now term "seminal and still-controlling" was not cited even once in the section of that brief headed "Supreme Court Precedent" (or elsewhere in plaintiffs' twenty-page discussion of the state action issue).[14] Nor is plaintiffs' previous disinclination to rely on *Steele* below surprising, for in truth *Steele* is not in point.

"The question" presented to the Court in *Steele* was "whether the Railway Labor Act imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all employees in the craft without discrimination because of their race." 323 U.S. at 193-94. The Court answered that statutory question in the affirmative, and stated its holding in purely statutory terms:

> We hold that the language of the Act to which we have referred, read in light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them. [*Id.* at 202-03]

Plaintiffs ignore *Steele's* holding and the analysis of the RLA's language and purpose that formed the predicate for that holding and base their analysis of *Steele* on the following dictum at the outset of the Court's opinion:

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[14] *See* Brief in Response to Appellants/Cross-Appellees and in Support of Cross-Appeal in C.A. 4 Nos. 83-1955, 83-1956, at pp. 10-30. Plaintiffs first relied on *Steele* in their Supplement Brief of Appellees/Cross-Appellants on Rehearing *En Banc* at 10-12.

> If, as the state court has held, the Act confers this power [of exclusive representation] on the bargaining representative of a craft or class of employees without any commensurate statutory duty toward its members, constitutional questions arise. For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the [RLA] purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, we must decide the constitutional questions which petitioner raises in his pleading. [*Id.* at 198-99]

Contrary to plaintiffs' contention, this passage does not state that absent a statutory constraint on a union's conduct as exclusive representative, the union would face constitutional constraints. Rather, the *Steele* Court said that absent a statutory constraint, "constituional quesions would arise"—"questions which petitioner raises in his pleading"—and that the Court would have to "decide" those questions.

Among the "constitutional questions" which the petitioner raised in *Steele* and which the Court would have had to face had the Court not read the RLA as creating a *statutory* duty of fair representation was the very question which plaintiffs pose here, *viz.*, whether the grant of exclusive representative status to a union so implicates the government in the union's conduct as to transform that conduct into governmental conduct.[15] But nothing in *Steele* supports the assumption that plaintiffs here make that by noting the existence of a constitutional

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[15] *See* Petition for Writ of Certiorari in No. 826, October Term, 1943, at 16-17.

question *Steele* somehow supplies an answer to that question, much less that *Steele* supplies the answer for which plaintiffs contend in this case.

Indeed, if contrary to our understanding of *Steele*, that decision could be read to decide that granting a union the status of an exclusive representative transforms all of that union's conduct as exclusive representative into state action, that conclusion could no longer be viewed as authoritative. As we have just seen, in the years since *Steele* this Court has decisively rejected that conclusion, pp. 15-16, *supra*, and, of at least equal importance, the Court has likewise decisively established a general principle of constitutional law that entirely negates the possibility of reaching such a conclusion, pp. 16-17, *supra*.[16]

CONCLUSION

For the reasons stated above, and in our opening brief, the judgment should be reversed.

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[16] Plaintiffs devote a large portion of their brief to arguing the merits of the "constitutionality *vel non* of the NLRA if 'government action' exists and [the union's] unlimited statutory construction is adopted." Resp. Br. at 29. As that formulation of plaintiffs' constitutional claims makes clear, those claims are dependent upon the existence of state action.

Unless a union's actions in negotiating and enforcing a union security agreement were attributable to the government, the fact that the Act permits such agreements would be of no constitutional moment. As even plaintiffs acknowledge, the Constitution does not impose any affirmative duty on the government to proscribe private conduct or private agreements and thus *state inaction* does not give rise to a constitutional claim. Accordingly, our showing in text that the government is not implicated in the private negotiation and enforcement of union security agreements to industries covered by the NLRA is dispositive of all plaintiffs' constitutional challenges.

Respectfully submitted,

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No. 86-637

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

COMMUNICATIONS WORKERS OF AMERICA AND
ITS LOCALS 2100, 2101, 2108 and 2110,
Petitioners,

v.

HARRY E. BECK, JR., *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 89 national and international unions representing approximately thirteen million working men and women, submits this brief *amicus curiae* with the consent of the parties as provided by in the rules of this Court.

SUMMARY OF ARGUMENT

The showing by petitioners Communications Workers of America et al. ("CWA") and by the United States as *amicus curiae* that, in enacting and amending the National Labor Relations Act, Congress decided to leave unions free to negotiate union security agreements requiring all persons represented by a union to pay an amount equal to union dues suffices to establish that the court below erred in holding that CWA violated that Act by negotiating precisely such an agreement. It is nonetheless useful, we believe, in approaching this statutory issue to bear in mind the extent to which Congress, in shaping the NLRA, has established safeguards to protect the interests of persons who do not wish to support a union and, equally important, to understand the fundamental considerations which support Congress' decision not to grant such individuals the type of right plaintiffs here claim. The AFL-CIO therefore submits this brief to make clear what Congress has done in this area and the practical wisdom of Congress' decisions.

In several different respects, the NLRA and the subsequently-enacted Labor-Managemnt Reporting and Disclosure Act of 1959 ("LMRDA") limit what can be demanded of nonmembers and also extend significant rights to nonmembers as against unions. To begin with, under the Act, individuals who do not wish to support a union can be obligated to do os only if a more-or-less homogeneous group of which such individuals are a part decides democratically that all mebers of the group should owe such obligations to the group. Furthermore, where these conditions are satisfied, nonmmebers can be required to do nothing more than pay the initiation fees and dues required of members. In addition, federal law seeks to assure that the dues union receive will be used to forward the interests of those the union represents, and federal law prohibits the use of such dues to make political contributions or expenditures in federal

eletcions. And finally, federal law assures nonmmebers who may be required to support a union that their interests will be fairly represented by that union. Pp. 8-11 *infra.*

At the same time, the statutory scheme Congress crafted protects the interest of the majority, and the public interest in labor peace, by leaving the majority free to require that all those in the bargaining unit provide the same quantum of financial support to the union. To engraft upon this scheme a provision granting those who object to supporting a union the right to refuse to contribute to those activities "not germane to the union's duties as collective bargaining agent," *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984), would upset the careful balance Congress struck between majority and minority rights. This is true in at least three respects.

First, a rule that grants a discount to aynone claiming an objection to paying union dues inevitably will tempt some to assert an objection for the cost savings that result, for bargaining leverage in getting his way on demands made on the union, or as a sanction against the union for refusing to acceded to a particular demand. Such a discount affects not only the overall financial situations of unions (and especially the ability of unions to undertake activities which generate the right to make an objection) but also the conduct of the union's internal affairs. Pp. 12-14 *infra.*

Second, in any regime in which objectors are required to support only "germane" activities, the government ultimately must put its own gloss on the scope of the union's "duties" as exclusive representative and, moreover, on which activities are reasonably related to those duties. That is not a task for which courts are well-suited; the unhappy history of standardless, judicial superintendence of the affairs of labor unions provides ample support for Congress' disinclination to assign such tasks to those outside the union. Pp. 14-17 *infra.*

Third, a rule granting objectors the right to refuse to contribute to certain union activities necessarily generates large transaction costs—costs which take away from the resources available to the union to perform its principal mission, that of advancing the employment interests of the workers the union represents. Because the concept of "germane" and "non-germane" expenditures is a legal concept of highly particularized significance and not a bookkeeping or accounting concept of general utility to unions in ordering their affairs in a rational and efficient manner, in the normal course unions have no occasion to maintain their books and records in such a way as to separate out germane and non-germane expenditures. A rule allowing a union to charge objectors only for "germane" activities thus necessarily requires the union to establish a system that permits the segregation of germane expenditures, and requires the union to do the financial analysis each year to determine the proportion of expenditures devoted to germane activities. Pp. 17-21 *infra.*

Furthermore, because the largest proportion of virtually every union's budget goes to compensate employees who engage in a range of activity, some of which is chargeable to objectors and others of which is not, a union will be completely confident of its ability to establish to the satisfaction of a third party the proportion of its expenditures devoted to germane activities only if the union institutes some form of time keeping for its officers and employees and then analyzes these time records annually. The costs and burdens of doing so are considerable. Pp. 21-22 *infra.*

Finally, if objectors are given a right not to contribute to germane activities, the objectors likewise must be given the right to challenge the union's determination of what proportion of its expenditures are germane. And because objectors are able to obtain free legal assistance to mount such challenges, it is in their interest to press such litigation without regard to its cost, or to the amount of

money at stake for the objectors. As a result, the expense of objector litigation to unions can dwarf even the heavy record-keeping costs and can tax union resources to and beyond their limits. Pp. 22-26 *infra*.

In sum, in enacting the NLRA, Congress soundly balanced competing interests and arrived at an accommodation which affords significant protection to objectors yet at the same time avoids the degree of judicial oversight and the high level of transaction costs that would necessarily follow if objectors were afforded the right to refuse to contribute to "non-germane" activities.

ARGUMENT

IN ENACTING AND AMENDING THE NATIONAL LABOR RELATIONS ACT CONGRESS CAREFULLY BALANCED THE COMPETING INTERESTS IMPLICATED BY UNION SECURITY AGREEMENTS

A. Writing for the Court in *Carpenters' Union v. Labor Board*, 357 U.S. 93, 99-100 (1958), Justice Frankfurter, in words the Court has quoted since on several occasions,[1] observed that "the Taft-Hartley Act was to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests." The instant case illustrates the truth of that observation.

As the brief of petitioners Communications Workers of America et al ("CWA" or "the Union") and the brief of the United States as *amicus curiae* demonstrate, at the time the National Labor Relations Act ("NLRA" or "the

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[1] *See Machinists Lodge 76 v. Wisconsin Empl. Rel. Comm'n*, 427 U.S. 132, 146 n.7 (1976); *Woodmark Manufacturers v. NLRB*, 386 U.S. 612, 619 (1967); *Labor Board v. Drivers Local Union*, 362 U.S. 274, 289-90 (1960).

Act") was enacted, and again when the NLRA was amended by the Labor Management Relations Act of 1947 ("LMRA" or "Taft-Hartley"), the question of whether, and to what extent, unions should be left free to seek and secure union security agreements was hotly contested. Opinion in the 1947 Congress ranged from support for a ban on all such agreements to a desire to permit virtually all such agreements. Ultimately Congress, as Senator Taft put it, adopted a position "in the middle," 2 National Labor Relations Board, *Legislative History of the Labor-Management Relations Act of 1947*, at 1403: Congress banned the closed shop but, in § 8(a)(3), 29 U.S.C. § 158(a)(3), Congress permitted union-shop agreements which require all bargaining-unit employees to pay "the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership" in the union.

Because the question posed here was thus a specific focus of congressional attention, the instant case, like *Carpenters' Union*, "affords a striking illustration of the importance of the truism that it is the business of Congress to declare policy" and that the "judicial function is confined to applying what Congress has enacted." 357 U.S. at 100. For that reason, the showing in the briefs of CWA and of the United States with respect to "what Congress enacted" suffices *in and of itself* to establish that the court below erred in holding that the Union had violated the NLRA by negotiating and enforcing a collective bargaining agreement which requires all bargaining unit employees to pay an amount equal to union dues to the Union.

The instant case also illustrates another important "truism," one that has received perhaps less attention in labor litigation. Legislatures need not, and usually do not, enact into law "neutral principles" and then give those principles their full sway. Rather, the legislative process "involves the balancing of competing values and

interests"; in "our democratic system [that] is the business of elected representatives." *Diamond v. Chakrabarty* 447 U.S. 303, 317 (1980).

That is precisely what Congress did in the LMRA with respect to the matter at issue here. Congress confronted a situation in which the associational interest of the majority conflicts with the non-associational interest of a minority of employees, and in which there is a strong public interest in a labor relations system that furthers industrial peace and stability. Congress sought to harmonize these seemingly irreconcilable interests through a careful compromise which provides important protections to individuals who are not and do not wish to become union members but which, within the congressionally-established limits—and within the limits of state law (which Congress opted not to disturb)—leaves union members and their unions free to pursue majority interests through the give-and-take of collective bargaining.[2]

As the Court stated in *Machinists Local v. Labor Board*, 362 U.S. 411, 418 n.7 (1960):

> It is well known, and the legislative history of the 1947 Taft-Hartley amendments plainly shows, that § 8(a)(3)—including its proviso—represented the Congressional response to the competing demands of employee freedom of choice and union security. Had Congress thought one or the other overriding, it would doubtless have found words adequate to express that judgment. It did not do so; it accommodated both interests, doubtless in a manner unsatisfactory to the extreme partisans of each, by drawing a line it thought reasonable. It is not for the administrators of the Congressional mandate to approach either side of that line grudgingly.

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[2] Because Congress did not itself impose any obligations on nonmembers but left that for private decisionmaking and state regulation subject to federal liimtations, no constitutional rights of *nonmembers* are implicated by anything Congress did. The briefs of the CWA and of the United States so demonstrate.

Against that background, in addressing the issues posed here it is useful, we believe, to bear in mind both the extent to which Congress has safeguarded the interests of nonmembers and also the important considerations which support Congress' decision, in shaping the LMRA, not to extend further protection to such individuals. The AFL-CIO submits this brief to make clear what Congress has done in this area and the practical wisdom of Congress' decisions.

B. In several different respects, both the NLRA, as amended by the LMRA, and also the subsequently-enacted Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401 *et. seq.* ("LMRDA"), limit what can be demanded of nonmembers and extend significant rights to nonmembers as against unions.

To begin with, in enacting the LMRA, Congress placed important constraints on the freedom of unions to negotiate union security agreements and thus limited the situations in which a union may impose *any* obligations on nonmembers. Prior to 1935 a union with a strong enough position in a labor market was free to negotiate a union security agreement with any employer in that market, regardless of the wishes of the employees of that employer; by securing such agreements unions were then able to foreclose nonmmebers from employment with the signatory employers. Section 8(3) of the original Wagner Act, and § 8(a)(3) of the Taft-Hartley Act, put an end to that practice by permitting union security agreements only where the employees, by majority vote in a unit deemed by the National Labor Relations Board to be "appropriate" for collective bargaining, choose the union to be their representative.

Moreover, under the Act a "unit" is "appropriate" for these purposes only if all of the employes in the group "share a 'community of interest.'" *NLRB v. Action Automotive*, —— U.S. ——, 53 L.W. 4131, 4133 (Feb.

19, 1985). This "community of interest" test "prevents a functionally distinct minority group of employees from being submerged in an overly large unit." *Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 172 (1971). Thus individuals who do not wish to support a union can be obligated to do so only if a more-or-less homogeneous group of which such individuals are a part decides democratically that all members of the group should owe such obligations.

Second, where these conditions are satisfied and where state law permits some form of union secuirty agreement, the LMRA, in the interest of nonmembers, limits what the majority and their union may demand. A union may not, for example, foreclose nonmembers from securing jobs with an organized employer; unlike the Wagner Act, the LMRA permits a majority union to negotiate only a "union shop" and not a "closed shop." Nor may a union seek to obtain the same result as that obtained through the closed shop indirectly by negotiating a union shop agreement and then maintaining a "closed" union; by its terms, § 8(a)(3) forbids a union from enforcing a union security clause against an individual who is denied membership "for some reasons other than the failure of the employee to tender the periodic dues and the initiations fees uniformly required as a condition of acquiring or retaining membership." [3]

Furthermore, in *NLRB v. General Motors*, 373 U.S. 734 (1963), the Court interpreted the language just quoted to mean that a union may not even demand that a nonmember agree to join the union and thus become subject to the unions' rules and regulations. Rather, under *General Motors* all that can be demanded of the nonmember is that he pay dues.

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[3] Unions also are prohibited from charging initiation fees in amounts that effectively "close" the union; NLRA § 8(b)(5), 29 U.S.C. § 158(b)(5) proscribes initiation fees which are "excessive or discriminatory."

Third, as § 8(a)(3)'s language makes clear, the LMRA limits what may be required of the nonmember by way of dues. Specifically, the nonmember can be charged no more than "the periodic dues and initiation fee uniformly required as a condition of . . . membership." This limitation is particularly significant because, under § 101(a)(3) of the LMRDA, 29 U.S.C. § 411(a)(3), the dues charged to members must be determined by the members either directly through referendum vote, or, in the case of national unions, through the vote of elected representatives. In other words, nonmembers can be charged only that which members themselves—through democratic processes—agree to pay. And one of the major premises of our governmental system is that such a political process provides "in general a sufficient security against erroneous and oppressive taxation" because "[i]n imposing the tax the legislature acts upon its constituents." *McCulloch v. Maryland*, 4 U.S. (Wheat.) 316, 428 (1819).

Fourth, federal law seeks to assure that the dues unions receive (both from members and nonmembers) will be used to forward the interests of those the union represents. That is, in essence, the point of the entire LMRDA: "to ensure that unions would be democratically governed." *Finnegan v. Leu*, 456 U.S. 431, 441 (1982). And LMRDA § 501, 29 U.S.C. § 501, provides particular protection in this regard by declaring that union officers who hold union monies "occupy positions of trust" and are obligated to expend the money "solely for the benefit of the organization" and not for personal gain.

Fifth, recognizing that in one particular the individual intersts of employees in an organized unit are of such moment as to require special protection, LMRA § 304, and its successor, § 321 of the Federal Election Campaign Act, 2 U.S.C. § 441(b), prohibit unions from using dues money to make political contributions or expenditures in federal elections. Many states have enacted like prohibition with respect to state elections. Thus, to a large

extent, nonmembers cannot be required to support the union's political activities.

Sixth, and finally, the NLRA assures nonmembers who may be required to support a union that their interests will be fairly represented by that union. Even though it may be greatly in its institutional interst to do so, a union may not use its collective strength to secure higher wages and greater benefits for its members than for nonmembers or to otherwise aggrandize the position of the majority at the expense of the minority. NLRA § 8(b)(1) & (b)(2) and the duty of fair representations all prevent the union from using its authority to gain for its supporters the type of preferences through which popularly elected representatives normally seek to solidify their political standing.

In sum, the national labor policy does not leave persons who oppose unionization at the "mercy" of unions; rather federal law grants such individuals important rights with respect to what can be demanded of them (and under what circumstance) and what they may demand in return.

B. At the same time, the statutory scheme Congress crafted protects the interests of the majority by leaving the majority free to require that all those in the bargaining unit provide the same quantum of financial support to the union. A union represents—indeed, as we have seen, must represent—all employees within the bargaining unit, and seeks to advance their interests as employees in a variety of ways, through collective bargaining, through ancillary actions designed to strengthen the union's hand in bargaining, *see* pp. 14-15 *infra*, and through supplementary actions away from the bargaining table. The union's accomplishments in these regards necessarily redound to the benefit of all members of the unit; that is true not only of what is achieved in negotations with respect to wages and working conditions but

also of what is achieved through work in the legislative arena, the judicial arena, or elsewhere.

Congress' judgment to permit agreements under which all persons in the bargaining unit pay the cost of these activities allows for the classic solution for "pricing" a "public good," *viz.*, a "good" whose benefit flows to all persons in a polity whether or not the person purchases the good. The market cannot work to finance such goods because each individual knows that he or she will benefit from the group activity whether or not he or she contributes to the cost. Accordingly, the appropriate economic solution is to empower everyone benefitted to vote on how much to expend for the beneficial activity. "Individuals, knowing that they must comply with the decision made by the collective choice or voting process, will find it in their interest to vote for that solution which will move the outcome closer to their own desires . . ." R. Musgrave & P. Musgrave, *Public Finance in Theory and Practice*, 55-56 (1976).

To engraft upon this scheme a right for objecting employees to refuse to contribute to activities "not germane to the union's duties as collective bargaining agent," *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984), would upset the careful balance Congress struck between majority and minority rights. This is true in at least three respects.

1. The first difficulty that inheres in any system in which conscientious objectors are exempted from an obligation owed by all others in the polity is the task of identifying those objectors. Human nature being what it is, a rule that grants a discount to anyone claiming an objection to paying union dues inevitably will tempt some to assert an objection for the cost savings that result, for bargaining leverage in getting his way on any of a hundred demands that could be made on the union, or as a sanction against the union for refusing to accede to a

particular demand. The numbers doing so can be expected to increase as the size of the discount increases.

The problem is exacerbated by the limited ability of unions and courts to separate *bona fide* objectors from opportunists; "[i]t is not within 'the judicial function and judicial competence'" to determine whose objections are based on genuine demands of conscience. *United States v. Lee*, 455 U.S. 252, 257 (1982).[4] It is in part for this reason that the Court has rejected the contention that the First Amendment grants religious objectors a constitutional exemption from income tax obligations. *See United States v. Lee, supra; see also Bowen v. Roy*, —— U.S. ——, 54 L.W. 4603, 4607 (June 11, 1986) (opinion of Burger, C.J.).

Had Congress granted objectors a privilege to pay less than full union dues, then, Congress would have created a financial incentive for the assertion of objections. Such a financial incentive would have affected not only the overall financial situation of unions but also, in particular, the ability of unions to undertake activities which generate the right to make an objection since every dollar spent on such activities increases the discount available to objectors and thus increases the incentive to object. That financial incentive would, in addition, have a potent effect on the union's internal affairs by increasing the ability of fervid minority factions to force the majority to bend to their will. Finally such an approach would be contrary to the interest in industrial peace because of the tensions that would be created by a rule which required the majority to accord the minority all the employment benefits achieved by group action but

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[4] *Cf. Abood v. Detroit Board of Education*, 431 U.S. 209, 241 (1977) (objectors cannot be required to specify the particular expenses to which they object because doing so would impinge upon objectors "freedom to maintain his own beliefs without public disclosure").

which deviated from the rule of equality in determining how the groups activity will be financed.

2. The second difficulty that inheres in nay regime in which objectors are required to support only those activities which are "germane to the union's duties as collective bargaining agent"—*viz.*, "activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative," *Ellis*, 466 U.S. at 448—is that ultimately the courts must put their own gloss on what the union's "duties" consist of and must determine which activities are "reasonably undertaken" to effectuate those duties. That is not a task for which courts (or government generally) are well-suited; the unhappy history of standardles, judicial superintendence of the affairs of labor unions provides ample support for Congress' disclination to reassign that responsibility to outsiders.

There are a vast array of activities which a union may choose to pursue with the ultimate aim of enhancing the economic situation of those the union represents. A union may, for example, seek to achieve greater internal cohesion and strength through a program of membership education or even social activities. A union may seek to strengthen itself by developing alliances with potential supporters, domestic or foreign, inside the labor movement or without. A union may, in anticipation of employer opposition, seek to improve public support for its collective bargaining position through a program of public education and public relations. A union may attempt to improve the economic climate for collective bargaining negotiations by seeking to persuade the government to follow macroeconomic policies of one sort or another. Or a union may focus on the microeconomic level by attempting to organize employees of competing employers, recognizing that the wages of employees of any one employer "are bound to be affected by the standard of wages of their trade in the neighborhood," *American Steel*

Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209 (1921).

The foregoing list of options could, of course, be even more extended. The fundamental point is this: unions confront a changing world and a dynamic economy in which collective bargaining results are determined not in a hermetically-sealed container but by a host of interrelated factors which run far beyond the particular employer or employers on the other side of the bargaining table. As a practical matter, the one option a union does not have is to put all its time, effort, energy and resources into direct collective bargaining and contract administration in the narrow sense of those terms, for a union that does so is certain in the relatively short run to fail.

Because the judgments a union must make among its available options such as those we have listed are intensely practical ones that cannot be captured in any rote formula—judgments, in other words, that are complex and indeterminate—there is no principle of law by which the courts can determine which activities have a close enough tie to collective-bargaining to be deemed "reasonably employed to implement or effectuate the duties of the union as exclusive representative." P. 14 *supra*. Whether a particular activity is important enough in furthering the bargaining unit employees interests as employees to be worth the expenditure is therefore most appropriately decided by the union members themselves through the union's democratic processes.

The dangers inherent in entrusting such judgments to judges are apparent from the "free-wheeling judicial exercise" in regulating unions of the period through 1935. *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 383 (1969). As this Court has observed, that judge-made law "was based on self-mesmerized views of economic and social theory," and was "clear[ly] disapprov[ed]" by Congress in fashioning the national labor policy. *Id.* at 382-83. Congress enacted a set of *statutory* rules to de-

limit the rights of employers, employees and unions precisely to take from the courts the principal responsibility for defining labor policy. And Congress specifically declined to regulate the level of dues charged by unions or the uses made of dues money so as to avoid outside intrusions into internal union affairs. Had Congress granted special rights to objectors and thereby empowered the courts (or some other agency of government) to decide which activities of unions are "germane" and which are not, Congress would have substantially deviated from its general plan and subjected unions, to a significant degree, to governmental oversight.

The instant case provides the most graphic illustration yet of the degree of judicial oversight of internal union affairs that is necessarily required under a regime in which objectors are obligated to contribute only to "germane" union activates. Through its democratic processes the members of CWA decided to pursue and to fund (from their wages) an array of activities away from the bargaining table. The elected president of the CWA testified that, in his view, "expenditures for legislative purposes, for contributions and the lke are 'germane' to collective bargaining in that they 'strengthen the hand,' as it were, of the Union when actual collective bargaining procedures begin . . ." Pet. App. 254a-55a. Two expert witnesses—Dr. Willard Wirtz, former Secretary of Labor, and Dr. Walter Galenson, Professor of Economics and Industrial Relations at Cornell University—generally concurred. *Id.* at 255a.

The Special Master and the District Court disagreed, however, and held that the CWA is not permitted to pursue its vision as to how best to improve its collective-bargaining position, or at least was not free to do so with the dues of objectors. And having rejected the Union's own judgment as to how to "effectuate the duties of the union as exclusive representative," the Special Master embarked upon his own independent assessment of each item of union activity, stating that while it was "impracticable, if not impossible, to fashion an applicable rule or

guide . . . in regard to permissibility [of particular expenditures] . . . like obscenity, [the Special Master] 'knows it when he sees it.'" *Id.* at 257a.

Our point is not to fault the Special Master for his approach to this case. To the contrary, we believe that his decision illustrates the inherent difficulties in assigning to the courts the task of separating "germane" from "non-germane" activities. We point to the Special Master's decision thus to illustrate the wisdom of Congress in permitting unions to require all members of an organized bargaining unit to pay to the union an amount equal to union dues, rather than in extending special rights to objectors to pay a lesser amount.

3. There is a third consideration that further supports Congress' decision not to grant objectors a right to refuse to contribute to certain union activities: such a right necessarily carries with it large transactions costs—costs which have proven to be quite high and which reduce the resources available to unions to perform their principal mission, that of advancing the employment interests of the workers the union represents.

(a) The starting point for analysis is the recognition that the concept of "germane" and "non-germane" expenditures is a *legal* concept of highly particularized significance, and not a bookkeeping or accounting concept of general utility to unions in ordering their affairs in a rational and efficient manner. In the normal course, therefore, unions have no occasion to maintain their books and records in such a way as to separate out germane and non-germane expenditures, or even to maintain books and records in such a way that the separation can be readily made.

Thus, as the Special Master here found, prior to the decision below "CWA maintain[ed] an elaborate system of books of accounts with some 63 different account numbers." Pet. App. at 252. But CWA "did not maintain its books and records on the basis of allocating all of its

expenditures between collective bargaining, contract administration and grievance adjustment, on the one hand"—the only activities the Special Master deemed "germane"—and "all other expenditures on the other." *Id.* Consequently, in an effort to demonstrate the proportion of its dues income that it expended on germane activities (and thus the proportion of plaintiffs' dues that CWA was entitled to retain) CWA was forced to attempt to allocate its expenditures based on a record-keeping system that was established for different purposes altogether. Doing so, in the Special Master's judgment, "was like trying to make a 'frog fly,'" Pet. App. at 253a, and it was his conclusion that

> [b]ecause of the lack of required data to support a number of attempted allocations—many involving substantial amounts of money—the Special Master was required to hold such expenditures to be impermissible [*i.e.* not chargeable to objecting employees] in whole or in part, so that ultimatley 81 percent of CWA expenditures were held to be impermissible and 19 percent permissible. [*Id.* at 170a]

Thus, a rule allowing a union to charge objectors only for "germane" activities necessarily requires the union to establish a system that permits the segregation of germane and non-germane expenditures and then to do the financial analysis each year to determine the proportion of expenditures devoted to germane activities. Indeed, since most unions are divided into locals, intermediate bodies, and a national parent body—each of which is entitled under the union's constitution to a share of each dues dollar and each of which operates separately and keeps its own books and records—normally *three* such systems must be devised and *three* such analyses must be made yearly with respect to each objector. In the instant case, for example, CWA retained a statistician and two certified public accountants to develop such a system for the Union and CWA continues to be required to retain outside experts to review the operation of that system and

to perform and verify the required calculations each year. *See* Pet. App. at 174a-198a.

A simple illustration may help explain the problem unions face in separating germane and non-germane activities and the burdens entailed in attempting to doing so. Most unions expend money to secure legal services. Larger unions tend to have an in-house legal department, as well as outside counsel, while smaller unions more frequently will have only outside counsel who are either paid a retainer or an hourly fee for services rendered to the union. Assuming a union maintains its financial records on a departmental or functional basis, the union's regular record-keeping system will enable the union to determine at the end of each fiscal year the expenditures for its legal department or for legal services generally.[5]

In *Ellis*, however, this Court concluded that § 2, Eleventh of the Railway Labor Act, 49 U.S.C. § 152, Eleventh, does not permit unions covered by that Act to charge objecting employees for all legal expenses.[6] In particular, the Court held:

> The expenses of litigation incident to negotiating and administering the contract or to settling grievances and disputes arising in the bargaining unit are

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[5] A union which maintains an in-house legal department will be able to ascertain the total cost of that department only if the union's records show, *e.g.*, the cost of the supplies consumed by the legal department, the cost of services (such as printers, messengers, overnight mail delivery) used by the department, and the professional and non-professional salaries of personnel in the department. Needless to say, not all unions elect to maintain their records on this basis (as opposed to, *e.g.*, maintaining a single line for supplies used by all departments, a single line for all printing bills etc.).

[6] The Court in *Ellis* expressly declined to decide whether the First Amendment permits a union to charge objectors for all legal expenses. *See* 466 U.S. at 455; *see also Teachers v. Hudson*, —— U.S. ——, 54 L.W. 3231, 3235 n.13 (March .., 1986) (declining to decide whether First Amendment prohibits charging objectors for "non-germane, non-idelogical expenditures").

> clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative. The same is true of fair representation litigation arising within the unit, or jurisdictional disputes with other unions, and of any other litigation before agencies or in the courts that concerns bargaining-unit employees and is normally conducted by the exclusive representative. The expenses of litigation not having such a connection with the bargaining unit are not to be charged to objecting employees. [466 U.S. at 453].

On that basis the Court concluded that, "unless the Western Airlines bargaining unit is directly concerned" in a particular piece of litigation, the objecting employees in that case, who worked for Western Airlines

> need not share the costs of the union's challenge to the legality of the airline industry mutual aid pact [under which all airlines agree to share revenues with any airline which is the subject of a strike]; of litigation seeking to protect the right of airline employees generally during bankruptcy proceedings; or of defending suits alleging violation of the nondiscrimination requirements of Title VII. [*Id.*].

If NLRA unions were to be faced with the same obligations that *Ellis* imposes on RLA unions, each NLRA union would be required to maintain its financial records in such a form as to enable the union to separate out, for each represented bargaining unit, the costs of litigation in which the "bargaining unit is directly concerned" from litigation "not having . . . a connection with the bargaining unit." This would mean, in the first instance, that each such union would be compelled to develop a new record-keeping system from which the purpose of each litigation expenditure could be determined. Moreover, because such systems are not self-executing, each union would be required to assign or retain someone each year to review the litigation expenditures to determine separately for each bargaining unit represented by the union

the amount expended on litigation "germane" to that unit. The cost of developing, maintaining, and annually analyzing these records for each unit within the union (*viz.*, the national and each of its locals and intermediate bodies) and for each bargaining unit undeniably would be significant, and would be incurred for no reason other than to enable the union to comply with the obligation not to charge objectors for "non-germane" activities.

Similarly, although *Ellis* recognizes that a union "must have a channel for communicating with the employees, including the objecting ones, about its activities," the Court concluded that the RLA permits unions to charge objectors only "for reporting to them about those activities it can charge them for doing"; "[i]f the union cannot spend dissenters' funds for a particular activity it has no justification for spending their funds for writing about that activity." *Id.* at 450-51. If a like rule were imposed on NLRA unions, each such union which negotiates a union security agreement (and, again, each local and each intermediate body that shares in an objector's dues) would need to determine annually what portion of the cost of each union newspaper (or other union publication) is attributable to reporting about germane activities.

(b) The record-keeping burdens described above are complicated still further by the fact that because unions provide a labor-intensive service—representation—the largest proportion of virtually every union's budget goes for employee compensation. Most elected union officers and many appointed union employees engage in a range of activity, some of which is chargeable to objectors and other of which may not be. For example, a business agent or field representative may spend part of his day on collective bargaining, part on contract administration, part in organizing a new unit, and part on political or community-service activities. A union lawyer provides legal advice with respect to both germane and non-germane activities of the union, and the lawyer may engage in both

germane and non-germane litigation. A union researcher, publicist, or librarian provides assistance to bargainers and to lobbyists. And the union's newspaper writers will cover both types of activities.

The upshot of all this is that a union will be completely confident of its ability to establish to the satisfaction of a third party the proportion of its expenditures devoted to germane activities only if the union institutes some form of time keeping for its multi-purpose officers and employees so as to be able to prove how these individuals spend their work time. Indeed in the instant case the Special Master expressly faulted the Union because it "did not establish a system for the keeping of contemporaneous time sheets by its upper echelon officers and employees, indicating the function for which such time was expended, so that the Union would have some credible basis for meeting its burden of proof." Pet. App. 272a, The Special Master observed that "[s]uch a system has been established rather generally in the legal profession, whose members frequently charge their fees on the basis of their professional services supplied their clients, and there does not appear to be any substantial difficulty in establishing such a system for unions as well." *Id.*

Instituting a system of time-recording for a large number of lay union representatives, who never have been required to record how they spend their work time and who do little paperwork generally, is, of course, far more difficult than establishing such a system for professionals for whom time recording is second nature. In all events at least this much is clear: requiring unions to develop such records and to analyze them annually would cause the unions to incur substantial new costs solely to be able to defend the charges made to objectors.

(c) To this point we have focused solely on the internal costs that a union which is permitted to charge objectors only for germane activities would incur to establish and operate a system that will enable the

union to separate germane from non-germane expenditures. But those costs are only a piece—indeed in many instances a relatively small piece—of the total burden that faces a union which must operate under such a limitation on what the union may charge objectors. For if objectors are given a right not to contribute to non-germane activities, the objectors likewise must be given the right to challenge the union's determination of what proportion of its expenditures are germane. And the experience of public sector and RLA unions proves that the costs of such litigation outweigh even the heavy record-keeping costs described above.

In order to understand the litigation burdens that, as a practical matter, would inevitably follow a ruling permitting NLRA unions to charge objectors only for "germane" activities, three factors must be kept in mind.

First, although, as a general rule, relatively few employees in organized bargaining units object to paying full union dues, each unit is likely to have a few such objectors. These individuals may hold deep-seated ideological objections towards the concept of unionization in general or may be antagonistic towards the particular union that serves as their representative. Thus, in any unit there is likely to be at least a handful of individuals willing, indeed eager, to serve as plaintiffs in contesting any action of the union, including the level of dues charged to objectors.

Second, from time to time in the history of a bargaining unit, disputes arise between rival unions or between rival political factions within a single union. When this occurs, the potential is great for litigation brought by those who oppose the incumbent union or its leadership. In such instances "objectors" can use a means close at hand to pursue concerns wholly separate from those envisioned in creating the right to object.

Third, whereas the litigation system is grounded on the assumption that, in general, litigants will not bring

cases where the cost of litigation exceeds the amount at issue, that assumption is invalid with respect to "objector litigation." Ideological suits always constitute a special class and in this instance such litigation has been fueled by the National Right To Work Committee and its litigation arm, the National Right to Work Legal Defense and Education Foundation which provide free legal assistance to employees willing to attack union security agreements.[7] The ultimate aim of objectors and their legal supporters are obviously furthered when unions are forced to shoulder litigation costs which are out of proportion to the amount of dues owed to the unions by objectors. Indeed, in this very case—which has been litigated for over ten years, and involved 27 hearing days, six district court opinions, and two opinions by a special master—the maximum dues charge to any plaintiff was under $200 per year and the 80% rebate the district court ordered (because of the inadequacy of CWA's records for the years prior to 1983) provided plaintiffs with recoveries for a seven-year period ranging from $87 to a maximum of $1252. *See* Pet. App. 107a, 310a.

In light of all these factors it is not at all surprising that, notwithstanding the small financial stakes involved,

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[7] The National Right to Work Committee "was organized in 1955 by a group of employers," *UAW v. National Right to Work Legal Defense and Education Foundation, Inc.*, 781 F.2d 928, 929 (D.C. Cir. 1986); its stated purpose is to "oppose[] compulsory unionism through various activities," *UAW v. National Right to Work Committee*, 590 F.2d 1139, 1143 (D.C. Cir. 1978). In 1968 the Committee created the National Right to Work Legal Defense and Education Foundation for "the principal purpose of providing financial assistance to workers who bring lawsuits attacking features of 'compulsory unionism.'" *Id.* The Foundation in large part funds objector litigation with monies contributed by employers; indeed the Foundation's counsel has testified that without employer contributions "the effectiveness of litigation against unions, for practical purposes, is completely destroyed." *UAW v. National Right to Work Foundation*, No. 839-73 (D.D.C.) (Hearing of Oct. 4, 1973, Tr. 2).

unions in the public and RLA sectors have found themselves barraged by litigation brought on behalf of objectors challenging both the procedures established by the union for collecting fees from objectors and also the union's calculation as to the amount of the advance reduction in dues to which objectors are entitled. Nor is it surprising that this litigation has proven to be costly and complex, taxing union resources to and beyond their limits.[8]

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[8] This Court's decision in *Teachers v. Hudson, supra*, has spawned a new generation of objector litigation of two discrete types.

First, unions have been faced with a rash of "procedural" lawsuits challenging, *e.g.*, the notice afforded to "potential objectors" with respect to "the propriety of the union's fee," *Hudson*, 54 L.W. at 4235; the "verification by an independent auditor" of the union's "major category of expenses," *id.* at 4235 n.18, and the internal procedures established by the union to adjudicate the objector's challenges "in an expeditious, fair, and objective manner," *id.* at 4235. *See, e.g., Andrews v. Education Ass'n*, No. 87-7225 (2d Cir., pending); *George v. Baltimore City Public Schools*, No. R 87-866 (D. Md.); *Grunwald v. San Bernardino City Unit School District*, No. 87-3381 (C.D. Cal. June 19, 1987); *Cripe v. Illinois Education Labor Relations Board*, No. 87-3214 (C.D. Ill.); *Gilpin v. AFSCME*, 643 F. Supp. 733 (C.D. Ill. 1986). No aspect of the procedures developed by unions has proven immune from challenge; even those unions which have allowed the American Arbitration Association to choose the arbitrator who will resolve objections have been sued on the ground that that organization is not "impartial." *See Andrews v. Educ. Ass'n, supra.*

Second, to comply with the requirement of a "reasonably prompt decision by an impartial decisionmaker," *Hudson*, 54 L.W. at 4236, public sector and RLA unions now face annual arbitrations or annual hearings before state administrative agencies to justify the charges made to objectors. To our knowledge, unions have been uniformly successful in proving that they correctly calculated their germane expenditures and that those expenditures constitute on the order of 80% to 90% of the union's total expenditures from dues income. *E.g., Denham and AFSCME District Council 31*, AAA No. 51 673 001 861 (Arbitrator Duda, Nov. 29, 1986); *Chicago Fire Fighters Union*, AAA No. 51 390 0479 85 B (Arbitrator Briggs, Oct. 4, 1986); *Service Employees Local 46* (Arbitrator Nathan, March 18, 1987); *United University Professors*,

C. The short of the matter is this: the showing of CWA and of the United States that Congress decided to leave unions free to negotiate union security agreements requring all bargaining-unit employees to pay an amount equal to union dues is, in and of itself, dispositive here without regard to Congress' wisdom or lack of wisdom. *See* pp. 5-7 *supra*. But even if such policy matters were relevant to the judicial function, the fact of the matter is that Congress has soundly balanced competing interests and arrived at an accommodation which affords significant protections to objectors yet at the same time avoids the degree of outside oversight and the high transaction costs that would necessarily follow if objectors were afforded the right to refuse to contribute to non-germane activities.

CONCLUSION

For the foregoing reasons, and those stated in the brief of petitioners and of the United States, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AAA No. 15 673 0002 87 (March 20, 1987); In *re Judy Gender*, No. 85-FSC-320-A (Minn. PERB, Feb. 27, 1987); *Brotherhood of Railway Clerks*, AAA 18 673 0001 85 (Arbitrator Sirefman, Dec. 29, 1986); *California State Employee Association*, AAA 74 673 001 86 (Arbitrator Richman, Feb. 2, 1987); *Teamsters Local 726*, AAA 51 673 0001 870 (Arbitrator Molinowski, May 4, 1987); *New Jersey Education Association*, AAA 18 673 0001 875 (Arbitrator Mitrani, April 23, 1987); *Indiana Teachers*, AAA 52 673 0001 86 (Arbitrator Duda, Feb. 6, 1987).

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No. 86-637

In The

Supreme Court of the United States

October Term, 1986

COMMUNICATIONS WORKERS OF AMERICA AND ITS LOCALS 2100, 2101, 2108, and 2110,

Petitioners,

v.

HARRY E. BECK, JR., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION; SAG LEADERS FOR LABOR JUSTICE; CHARLTON HESTON; CLAUDE AKINS; ISABEL BONIFACE; RORY CALHOUN; DON DE FORE; HUGH GILLIN; HOWARD KEEL; MARK MC INTIRE; CHRISTOPHER MITCHUM; MORGAN PAULL; MARIE WINDSOR; AND ALAN YOUNG IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF AMICI

Amici, Pacific Legal Foundation, *et al.*, file this brief pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for the parties and has been lodged with the clerk of this Court.

Pacific Legal Foundation (PLF) is a nonprofit, charitable corporation organized under the laws of the State of California for the purpose of litigating issues involving the public interest. Policy for the Foundation is

set by a Board of Trustees made up of concerned citizens, the majority of whom are attorneys. The Board of Trustees approves participation in a case only when there is broad support for PLF's position in the general community. The Board has approved the filing of this brief.

This case involves the issue of whether workers governed by federal labor law are entitled to the protections of the Federal Constitution in their labor relations activities. In resolving this issue, the Court's decision is likely to go a long way toward settling the issue of what constitutes "government action" and thus will determine the types of activities that will be subject to constitutional strictures. As such, the members and supporters of Pacific Legal Foundation are vitally interested in this litigation.

SAG Leaders for Labor Justice is an unincorporated association whose sole purpose is to seek legislative and/or judicial remedies to First Amendment violations caused by the expenditure of compulsory labor association dues on matters not germane to collective bargaining. Membership in the association is limited to 12 individuals who are now or at one time have been elected officials of the Screen Actors Guild.

Charlton Heston is the President of SAG Leaders for Labor Justice and former President of the Screen Actors Guild. Claude Akins is the former National Recording Secretary for the Screen Actors Guild. Isabel Boniface is a current board member of the Screen Actors Guild. Rory Calhoun is a former board member of the Screen Actors Guild. Don De Fore is a current board member of the Screen Actors Guild. Hugh Gillin is a former board member of the Screen Actors Guild.

Howard Keel is a past President of the Screen Actors Guild. Christopher Mitchum is currently the First Vice President of the Screen Actors Guild. Morgan Paull is a former board member of the Screen Actors Guild. Marie Windsor is currently the Eleventh Vice President of the Screen Actors Guild. Alan Young is a current board member of the Screen Actors Guild.

Each of these individuals is now or has been employed in an aspect of the motion picture/television industry covered by a collective bargaining contract with the Screen Actors Guild. In order to be employed in the industry one must belong and pay dues to the Screen Actors Guild. In addition to negotiating and enforcing collective bargaining agreements, the Screen Actors Guild expends compulsory dues revenues for political causes with which these amici do not agree. Amici are thus vitally interested in the instant action.

Amici are familiar with the issues, facts, and circumstances in this action and the scope of their presentation before this Court.

———o———

OPINION BELOW

The opinion of the en banc panel of the United States Court of Appeals for the Fourth Circuit is reported at 800 F.2d 1280 (1986).

———o———

STATEMENT OF THE CASE

Amici adopt respondents' statement of the case.

SUMMARY OF ARGUMENT

In a line of cases beginning with *Railway Employes' Department v. Hanson,* 351 U.S. 225 (1956), this Court has ruled that constitutional protections attach to agency fee agreements negotiated pursuant to federal labor law authorization. The fact that the National Labor Relations Act (NLRA) does not preempt state prohibitions of agency shop contracts does not affect this analysis.

Analyzing the government action issue in general, the most important point to keep in mind is the purpose of the requirement. As this Court noted in *Lugar v. Edmondson Oil,* 457 U.S. 922 (1982), the government action requirement preserves a domain of individual freedom of action free from federal judicial power. A finding of "government action" in this case will not invade this domain of individual freedom and private contract.

INTRODUCTION

Concerned with disruptive and often violent strikes, Congress enacted the NLRA (29 U.S.C. § 151, *et seq.*) to govern labor relations in the private sector. The NLRA openly encourages collective bargaining as the preferred

method of employer-employee relationships. 29 U.S.C. § 151. Collective bargaining allows employees, by majority vote, to designate an exclusive representative to bargain with the employer on the terms and conditions of employment. Once this exclusive bargaining representative is selected, the NLRA compels the employer to the bargaining table. To interpret and enforce the terms of the NLRA, the National Labor Relations Board (NLRB) was created. The NLRB has the power to prosecute unfair labor practices and to seek judicial enforcement of its orders.

For the most part, the NLRA displaces both state legislative and judicial power over covered employer-employee actions. Only in the area of union security agreements does Congress allow the states to participate in labor policy-making. 29 U.S.C. § 164(b). Even in that situation, Congress limited the state's role to deciding whether or not to ban such security agreements. *Id.*

In the absence of such state ban, the NLRA expressly authorizes the employee association to bargain for an agency shop fee clause in the collective bargaining agreement. 29 U.S.C. § 158(a)(3). Agency shop requires all employees in a bargaining unit to pay a fee equal to membership dues to the association serving as exclusive representative, whether or not the employee is a member or even wishes to become a member of that association. *Id.* The rationale behind the authorization of such compelled fees is to ensure that all employees pay their fair share of the costs of collective bargaining. Problems arise, however, when portions of the fee are used for the political and ideological activities of the employee association. In such cases, the nonmember employees generally complain

that such compelled political donations violate their First Amendment freedoms of speech and association.

The First Amendment, like most other provisions of the Constitution, does not regulate purely private conduct. Instead, the freedoms of speech, assembly, association, etc., are protected only from government infringement. Thus, to claim protection of the First Amendment, it must be shown that the infringement complained of exists directly or indirectly at the behest of the government. This is referred to as the "government action" requirement.

At issue in this case is the question of whether agency fee agreements entered into pursuant to the NLRA must conform to the requirements of the First Amendment. Specifically, is the NLRA's authorization of agency shop sufficient government action to invoke the protections of the Federal Constitution? Amici contend that such authorization in this case does indeed constitute "government action."

———o———

ARGUMENT

I

THE HANSON LINE OF CASES SUPPORTS A FINDING OF GOVERNMENT ACTION

A. Express Government Authorization Constitutes Government Action

This Court began to examine the government action issue in the context of agency shop fees in *Railway*

Employes' Department v. Hanson, 351 U.S. 225. In that case, an employee residing in Nebraska challenged the constitutionality of compelled fees noting that his state had outlawed the closed shop arrangements. This Court noted that the Railway Labor Act (RLA), which expressly authorized agency fee agreements, preempted contrary state legislation. Although the RLA did not compel the employer and employee association to include an agency fee arrangement in the collective bargaining agreement, this Court found "government action" by reason of the fact that the agreement would have been illegal under Nebraska law but for the preemptive status of the federal law.

Certainly, the narrow holding of *Hanson* rests on this feature of preemption. The language of the *Hanson* decision, however, seems to go further:

> "If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. . . . In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed." *Id.* at 232.

As this Court considered other issues in the agency shop context, the issue of preemption of state law did not seem to take on the importance ascribed to it in *Hanson.* Instead, attention centered on the point that government could not authorize private conduct violative of First Amendment rights. *See International Association of Machinists v. Street,* 367 U.S. 740, 777 (1961) (Douglas, J., concurring), *cited in Abood v. Detroit Board of Education,* 431 U.S. 209, 226 n.23 (1977). This line of reasoning culminated in this Court's decision in *Ellis v. Brotherhood*

of Railway, Airline and Steamship Clerks, 466 U.S. 435 (1984), in which the issue of the RLA's preemptive effect was not discussed at all. True, *Ellis* was decided under the same provisions of the RLA as was *Hanson.* In *Ellis,* however, there was no state statute outlawing the agency fee agreement at issue. Analytically, the *Ellis* decision's implicit finding of government action can rest only on one of two grounds. Either government action is present because the state government has been precluded from effective legislation in the area or because the federal legislation specifically authorized the conduct at issue.

As with the RLA, the NLRA specifically authorizes compelled agency fee arrangements.[1] Unlike the RLA, however, the NLRA does not preempt state laws forbidding agency shop. The issue now before this Court is whether this distinction results in a different application of federal constitutional protections for workers covered by the NLRA and the RLA.

B. The Nonpreemption Provision of NLRA Does Not Negate Government Action

As noted above, the NLRA specifically does not preempt state legislation forbidding agency shop. In the absence of such state law, however, agency fee agreements are specifically authorized by the NLRA. This Court has

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[1] In fact, because of the way that the Act is worded, if agency shop were not specifically authorized, it would be illegal under the Act. The Act specifically prohibits employer discrimination against employees on the basis of membership or nonmembership in a union. Thus, but for the proviso in Section 8(a)(3) (29 U.S.C. § 158(a)(3)), agency shop agreements would be illegal.

given the nonpreemption provision both an expansive reading and a narrow one, neither conflicting with the other. On the one hand, for instance, this Court has ruled that the nonpreemption clause of the NLRA applies to court jurisdiction as well as state legislation. Thus, in a state that has a law forbidding agency shop agreements, the state court is permitted to enforce the state law. *Retail Clerks International Association v. Schermerhorn,* 375 U.S. 96 (1963). This is at odds with normal NLRA practice where state judicial jurisdiction is wholly displaced by the National Labor Relations Board. *See San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959). On the other hand, this Court has downplayed the significance of the nonpreemption section noting that it only provides that federal policy on this issue is not exclusive. *Algoma Plywood v. Wisconsin Employment Relations Board,* 336 U.S. 301 (1949); *Schermerhorn,* 375 U.S. at 104.

The fact that federal policy on agency shop under the NLRA is not exclusive does not mean that there is no federal policy at all. Indeed, in the enactment of the NLRA Congress considered several forms of closed shop arrangements and weighed the advantages and disadvantages of each. At one time, the NLRA authorized "closed shops" whereby the employees would be required to become members of the union representing the bargaining unit. *National Labor Relations Board v. General Motors Corp.,* 373 U.S. 734, 739 (1963). Congress amended this provision so that now only agency shops are authorized. Under the agency shop, the only compelled conduct is payment of a periodic fee to the employee association. Congress' purpose in authorizing this private taxation system was not

to enrich employee associations nor to broaden the association's political activities. Instead, Congress always had as its overriding purpose in enacting the various provisions of the NLRA the promotion of a system of collective bargaining as a means of achieving labor peace. *Id.* at 743. In determining the form of union security arrangement to authorize (*i.e.*, closed shop or agency fee) Congress needed to balance this overall goal of collective bargaining with the competing issues of the problems of the "free rider" versus the problems of compulsory unionism. *Id.*

Thus, Congress did not abandon the policy decision on agency fees to the state, but instead chose to share it. By allowing this freedom of the states to legislate in this one narrow area, Congress did not remove the hand of government from the agency shop agreements. The only choice left to the states was to allow or not allow agency shop agreements. If the state decided to allow the agreement, or otherwise did not legislate on the issue, federal law commands that the issue is one of the subjects of permissible bargaining. Refusal of the employer to bargain on this issue is an unfair labor practice punishable under federal law by a federal agency. *See id.* at 737. Agency shop exists under the NLRA only as a conscious policy decision of Congress. *See* Footnote No. 1. The mere fact that the states are not prohibited from outlawing agency shop does not negate the government action present in authorizing, encouraging, and enforcing such agreements. The Court of Appeals was correct in its finding of sufficient government action in this case to invoke the protections of the Constitution.

II

THE CONDUCT AT ISSUE IS OUTSIDE THE ZONE OF PRIVATE RIGHTS

This Court has used a number of different formulations in determining the presence or absence of government action. In *Shelley v. Kraemer,* 334 U.S. 1 (1948), this Court found such government involvement in judicial enforcement, while in *Reitman v. Mulkey,* 387 U.S. 369 (1967), the finding of government action was predicated on a none too subtle policy of government encouragement for the action at issue.

Other cases have looked to whether government has compelled or influenced the action (*Rendell-Baker v. Kohn,* 457 U.S. 830 (1982)), or approved, encouraged, or coerced the act at issue (*Blum v. Yaretsky,* 457 U.S. 991 (1982)). Still other cases have looked for a nexus between the conduct and the government regulation (*Jackson v. Metropolitan Edison Company,* 419 U.S. 345 (1974)), while one decision sought to determine whether the state was the impetus or enforcer of the conduct at issue (*Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972)). Many of the cases come back to the rationale that government may not abdicate its responsibility by failing to act. *E.g., Reitman v. Mulkey, supra; Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961).

In his amicus brief, the Solicitor General seeks to categorize these cases on the basis of which constitutional right was at stake. The solicitor argues, for example, that what constitutes government action in the context of the Equal Protection Clause does not necessarily constitute government action in the context of other constitutional

freedoms. Such a distinction finds no support in either logic or the decisions of this Court.

Looking to the constitutional protection at issue helps this analysis only in the case of the Thirteenth Amendment, the one provision of the Constitution that clearly speaks to private conduct. Thus, the question of whether there exists government action would simply be irrelevant. In other circumstances, however, it makes no sense to look to the constitutional provision involved in order to determine the presence or absence of government action. To do so would suggest that some provisions of the Constitution proscribe private conduct in the same manner as government conduct. The solicitor's argument also fails because it ignores prior decisions of this Court. For instance, *Shelley v. Kraemer* involved the Equal Protection Clause of the Fourteenth Amendment, yet this Court cited to it for support in its finding of government action in *Abood v. Detroit Board of Education*, a case involving First Amendment protections of speech and association. *Abood*, 431 U.S. at 218 n.12.

Although the solicitor fails in his attempt, there exists a need to categorize and harmonize this Court's various decisions on the issue of government action. The first step in this process was taken by this Court in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, where the purpose of the government action requirement was discussed:

> "As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments . . . .' Careful adherence to the 'state action' requirement preserves an area of individual

freedom by limiting the reach of the federal law and federal judicial power." *Id.* at 936.

This framework starts by recognizing the purpose of the government action requirement and asks if a finding of government action in this case will serve or defeat that purpose. In other words, is the government a mere incidental party to conduct at issue, or is the conduct taking place in a framework wholly of government creation? Such an analysis subsumes questions of nexus, encouragement, authorization, compulsion, and coercion. In the case before the Court, the analysis leads to a finding of government action.

It can be argued that the conduct in the instant case results from the purely private action of the employer and the employee association agreeing to the terms of a collective bargaining agreement. Such an argument, however, ignores the greater context in which such an agreement takes place. Pursuant to federal law, the employer is compelled to bargain with the association proving it has the support of a majority of the employees. The dissenting employees cannot form their own group to bargain with the employer and in fact they are bound by the terms of the collective bargaining agreement negotiated by the majority association. These results are not compelled by common law, but instead the federal bargaining law itself. In fact, it was these same results, in part, that led Congress to authorize agency shop agreements in the first place. The agency shop is thought to provide the necessary compensation to the employee association to bargain fairly on behalf of all employees in the bargaining unit, whether

they belong to the association or not. *See National Labor Relations Board v. General Motors,* 373 U.S. at 743. While Congress is free to make such a policy judgment and legalize such a compulsory fee arrangement, it is not free to authorize compelled association or subsidization of the viewpoints of others. The negotiation and enforcement of the agency shop are not, then, purely private arrangements. Agency shop relies for its very existence on federal law. This is the essence of government action and the decision of the Court of Appeals should be affirmed.

CONCLUSION

The agency fee at issue in this case is not the result of a purely private contractual agreement. Rather, it is the result of a federally constructed framework that compels parties to the bargaining table, specifies what may or may not be the subjects of bargaining, compels nonsignatories to the terms of the agreement, and enforces these rules with a federal agency and federal judicial authority. It is not difficult to find "government action" in this context, instead it is difficult to ignore. Further, in the line of cases beginning with *Hanson,* this Court has offered the protections of the Federal Constitution to employees placed in an agency fee situation by a federal bargaining law. Those cases compel the same result in the instant

action. The decision of the Court of Appeals should be affirmed.

DATED: August, 1987.

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No. 86-637

In the Supreme Court of the United States

OCTOBER TERM 1987

COMMUNICATIONS WORKERS OF AMERICA and ITS LOCALS 2100, 2101, 2108, and 2110,
Petitioners,

v.

HARRY E. BECK, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AND APPENDIX BY SENATORS JESSE HELMS, STROM THURMOND, DAN QUAYLE, AND STEVEN SYMMS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

I. Do collective bargaining agreements negotiated under the authority of the National Labor Relations Act violate the First Amendment if they require employees to support financially the political activities of a union as a condition of employment?

II. Are collective bargaining agreements that compel employees to support financially the political activities of a union as a condition of employment authorized by section 8(a)(3) of the National Labor Relations Act?

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Cantor, *Uses and Abuses of Agency Shop,* 59 Notre Dame L.Rev. 61 (1983) 6

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Dep't. of Labor, *Characteristics of Major Collective Bargaining Agreements* (Jan. 1980) 6

T. Haggard, *Compulsory Unionism, the NLRB and the Courts* (Lab. Rel. & Pub. Pol'y Series No. 15, 1977) 6

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BRIEF BY SENATORS JESSE HELMS, STROM THURMOND, DAN QUAYLE, AND STEVEN SYMMS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

This *amicus curiae* brief for Senator Jesse Helms is filed with the written consent of all parties. Sup.Ct.R. 36.2. It supports the position of the respondents that they have stated cognizable claims for violations of their First Amendment rights and for a breach of the duty of fair representation owed to them by their collective bargaining representative.

INTEREST OF THE *AMICUS CURIAE*

Jesse Helms is a United States Senator from the State of North Carolina. He was first elected in 1972 and has held office continuously since then. Senator Helms has served as Chairman of the United States Senate Committee on Agriculture, Nutrition and Forestry, and is currently ranking minority member of the Committee on Foreign Relations.

As a member of Congress, Senator Helms has a responsibility to protect and promote the interests of working men

and women in the United States. Throughout his career in the United States Senate, Senator Helms has been particularly concerned about the injustices that result when employees are compelled to support financially the political activities of a union as a condition of employment.

Senator Helms believes that the positions he takes in this brief, particularly those related to the constitutional significance of this case to working men and women in the United States of America, may not otherwise be fully presented to the Court.

Joining with Senator Helms in this brief are United States Senators Strom Thurmond (R. S.C.), Dan Quayle (R. Ind.), and Steven Symms (R. Idaho).

STATEMENT OF THE CASE

I. Statutory Background

The correct resolution of this case cannot be disputed if the facts are analyzed within the context of federal labor law and policy. As noted by the petitioner, the National Labor Relations Act, 29 U.S.C. §§ 151-169 ("NLRA"), "is our nation's basic labor statute, covering virtually the entire private employment sector." Petition for Writ of Certiorari by the Communications Workers of America ("CWA"), at 9. Under the NLRA, a private sector employer is compelled by law to engage in "collective bargaining" with any union that has been "certified" by the National Labor Relations Board ("the NLRB") as an exclusive "collective bargaining representative." The NLRA defines collective bargaining as:

> . . . [T]he performance of the mutual obligation of the employer and [the union] to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . .[1]

[1] 29 U.S.C. § 158(d).

Under section 9(a) of the NLRA, a union is granted the statutory privilege of "exclusive representation," or the right to represent every employee within a particular "bargaining unit," after the union has been "certified" by the NLRB. Typically, a union is "certified" after the union has won a secret ballot election conducted by the NLRB among a group of employees in a proposed "bargaining unit." The NLRB election process is normally initiated when a union files a petition with the NLRB which states that certain employees wish to be represented by the union for collective bargaining purposes.[2] The NLRB investigates the "representation" petition to determine if the employees' employer is within the jurisdiction of the NLRA and establishes a proposed bargaining unit if jurisdiction and a question concerning representation are found to exist. Employees can be and are included in the proposed bargaining unit without their consent and against their will.[3]

After a proposed bargaining unit is established, the NLRB conducts a secret ballot election in which all of the employees within the unit are eligible to vote on whether they want the union to represent them for purposes of collective bargaining.[4] NLRB-supervised elections are often hotly contested by the union, the employer, and those employees who oppose the union and often involve members of the community and the press. Even if a majority of bargaining unit employees oppose the union, it will still be certified by the NLRB as the exclusive bargaining representative if a bare majority of those employees who vote cast their ballots for union representation.[5] Once the union

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[2] R. Williams, *NLRB Regulation of Election Conduct* (Lab. Rel. & Pub. Pol'y Series No. 8, 1985) at 5-15; *see also* Appendix at 1a.

[3] *Id.*; *see also*, 29 U.S.C. § 159.

[4] *Id.*; The form ballot used by the NLRB does not ask employees to vote on whether they want to become union members or whether they wish to support the union's political agenda. *See* Appendix at 3a.

[5] *See* Appendix at 5a.

is certified by the NLRB, section 9(a) of the NLRA requires that all employees accept the union as their exclusive bargaining representative, including employees placed in the bargaining unit against their will, employees who voted against the union, employees who did not vote, employees who voted for union representation who have subsequently changed their minds, and employees hired after the election.[6]

After the union is certified by the NLRB, the employer must engage in "good faith" collective bargaining with the union on all "mandatory" subjects of bargaining.[7] Unions and employers do not voluntarily agree on the topics that must be negotiated. Whether a topic is a mandatory subject of bargaining is instead a question of federal law that is ultimately resolved by the NLRB and the fed-

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[6] *See supra* at n. 3. Employees can petition the NLRB to decertify the union as their collective bargaining agent under section 9(c)(1)(A) of the NLRA. 29 U.S.C. § 159(c)(1)(A). The statutory right to decertify a union has been eviscerated for many employees as a result of two rules of practice developed by the NLRB. First, the NLRB will dismiss a decertification petition or hold it in abeyance if the union files unfair labor practice charges with the NLRB in which the union alleges violations of sections 8(a)(2) or 8(a)(5) of the NLRA, 29 U.S.C. §§ 8(a)(2) and (a)(5). *See NLRB Casehandling Manual (Part Two) Representation Proceedings* § 11730.3. Second, the unit for purposes of a decertification election is coextensive with the "contract unit" and not the bargaining unit that was initially certified by the NLRB. *Arlan's Dep't Store, Inc.*, 131 NLRB 565, 567 n. 7 (1961). Under this doctrine, if a majority of voting employees vote for union representation at a local facility, and if the union and employer subsequently consent to the application of a national agreement to the local facility, employees at the local facility are thereafter precluded from decertifying the union as their collective bargaining representative unless: (a) thirty percent of the employees working at *all* of the facilities to which the national agreement has been applied authorize the filing of a decertification petition; and (2) a majority of voting employees from all of the facilities vote for decertification in a NLRB-supervised election. *See Gibbs & Cox, Inc.*, 280 NLRB No. 110 (1986); *Westinghouse Elec. Corp.*, 227 NLRB 1932 (1977).

[7] 29 U.S.C. §§ 158(a)(5); *NLRB* v. *Borg-Warner Corp.*, 356 U.S. 342 (1958).

eral courts.[8] The source for one of the mandatory subjects is found in section 8(a)(3) of the NLRA, which states:

> [N]othing in this subchapter, or any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . .[9]

Provisions in collective bargaining agreements that require "union membership" are known as "union security agreements." [10] Twenty-one states have exercised their prerogative under section 14(b) of the NLRA to outlaw union security agreements within their borders.[11] In the other 29 states the question of union security is a mandatory subject of bargaining. An employer is *required* by law to negotiate with a union whether the collective bargaining agreement ultimately executed by the parties will require "union mem-

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[8] *Id.* An employer has the option of bypassing the NLRB election process if it is willing to voluntarily recognize the union as the bargaining representative for a majority of the employer's employees. An employer who has recognized a bargaining representative is still bound to negotiate all mandatory subjects of bargaining. The effect on an individual employee of an employer's decision to voluntarily recognize a union is *identical* to the effect of a NLRB election in which a majority of voting employees vote for union representation. In both instances, the union is granted the statutory right under section 9(a) to represent all of the employees in the bargaining unit and individual employees lose their right to negotiate their own employment contracts. *See* C. Morris, *The Developing Labor Law*, at 488-549 (2d ed. 1983).

[9] 29 U.S.C. § 158(a)(3).

[10] Morris, *supra*, n. 8 at 1359-1367.

[11] 29 U.S.C. § 164(b); *Idaho Voters Keep Right to Work Law*, [1986] Daily Lab. Rep. (BNA) No. 215, at A-9 (Nov. 6, 1986). Right-to-work laws do not protect employees of the federal government or employees covered by the Railway Labor Act, 45 U.S.C. §§ 151-188. The fifth circuit has ruled that right-to-work laws do not apply to private sector employees working on federal properties located in right-to-work states. *See Lord* v. *Local 2088, Int'l Bhd. of Elec. Workers*, 646 F.2d 1057 (5th Cir. 1981), *cert. denied*, 458 U.S. 1106 (1982).

bership'' as a condition of employment.[12] In the states that have chosen to allow union security agreements, ninety percent of the collective bargaining agreements covering more than 6,000,000 workers contain such clauses.[13]

Union security agreements negotiated under the NLRA almost without exception track the statutory language of section 8(a)(3) and state that ''union membership'' is a required condition of employment for all employees.[14] The agreements typically do not inform employees that the definition of ''membership'' under section 8(a)(3) has been ''whittled to its financial core.'' [15] The purpose of section 8(a)(3) is to insure that all employees who receive the ''benefits'' of collective bargaining share in the expenses reasonably associated with the union's performance of its role as collective bargaining representative.[16] A collective bargaining agreement may therefore be enforced against dissenting employees only to the extent they are compelled to pay union dues.[17]

Collective bargaining agreements that require ''union membership'' as a condition of employment have historically been known as ''union shop'' agreements. Contracts that require only the payment of fees to the union are called ''agency shop'' agreements. Union shop and agency shop agreements are ''practical equivalent[s]'' since only

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[12] *NLRB* v. *Gen. Motors Corp.*, 373 U.S. 734 (1963).

[13] Bureau of Nat. Affairs, *Collective Bargaining; Negotiations, and Contracts* at 87-3 (1986); United States Dep't of Labor, *Characteristics of Major Collective Bargaining Agreements*, at 1, 3, 23-24 (Jan. 1980).

[14] Cantor, *Uses and Abuses of the Agency Shop*, 59 Notre Dame L.Rev. 61 n.2 (1983); T. Haggard, *Compulsory Unionism, the NLRB and the Courts*, at 69, 70 (Lab. Rel. & Pub. Pol'y Series No. 15, 1977); D. Heldman, J. Bennett & M. Johnson, *Deregulating Labor Relations*, at 70, 71 (1981).

[15] *Id.*; *NLRB* v. *Gen. Motors Corp.*, 373 U.S. at 742.

[16] *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 41 (1954).

[17] *NLRB* v. *Gen. Motors Corp.*, 373 U.S. at 742.

"financial membership" can be required of dissenting employees under the authority of section 8(a)(3).[18]

II. The Proceedings Below

Over the past fifty years, hundreds of thousands of employees, like Harry Beck and his nineteen fellow plaintiffs, have been compelled under the authority of the NLRA to pay union dues to preserve their employment.[19] Plaintiffs are employed by the American Telephone and Telegraph Company and its subsidiaries ("AT&T"). Representation petitions were filed by the CWA with the NLRB, and plaintiffs were placed in proposed bargaining units by the NLRB without their consent.[20] A majority of employees who voted in NLRB-supervised elections voted to select the CWA as their bargaining representative. The CWA was then certified by the NLRB as the collective bargaining representative for all employees, including plaintiffs and others who voted against the union. The collective bargaining agreements ultimately executed by CWA and AT&T contain "agency shop" provisions. Plaintiffs are not signatories to the collective bargaining agreements and never consented to the agency shop provisions. Plaintiffs exercised their right to refrain from becoming union members and elected to meet their "membership" obligations by paying the CWA "agency fees" in an amount equivalent to union dues.

There has never been any dispute that substantial portions of the union dues and agency fees collected by the CWA are used by the union for political purposes. Having first been forced by federal law to accept the CWA as their bargaining representative, plaintiffs also discovered that

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[18] *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 217 n. 10 (1977).

[19] The original version of the NLRA, the Wagner Act, was enacted in 1935. 49 Stat. 449 (1935).

[20] NLRB rules prevent interested employees from intervening or even having a voice in unit determination issues. *See NLRB Casehandling Manual (Part Two) Representation Proceedings*, § 11194.3; K. McGuiness, *How to Take a Case Before the National Labor Relations Board*, at 98 (3d ed. 1967).

their compulsory agency fees were being used to support both candidates and causes they opposed. Because of their belief that Americans should be free to choose the political activities they support, plaintiffs commenced this action on 3 June 1976 in the United States District Court for the District of Maryland.

Plaintiffs' complaint alleges that the CWA has used portions of plaintiffs' compulsory fees for political and other purposes unrelated to "collective bargaining, contract administration and grievance adjustment." Plaintiffs contend that such expenditures violate their First Amendment rights of free speech and association and that the challenged expenditures constitute a violation of the CWA's duty to "fairly represent" all employees within the bargaining units. To remedy these violations plaintiffs seek a declaratory judgment establishing the illegality of CWA's expenditures; injunctive relief limiting future payments by plaintiffs to their share of the costs of collective bargaining, contract administration and grievance adjustment; and a refund for past illegal collections by the CWA.

The legal foundation for plaintiffs' claims was laid in three decisions of this Court between 1956 and 1963 interpreting the Railway Labor Act ("RLA").[21] The RLA applies to unions and employers in the railway and airline industries. Under section 2, Fourth, a majority of employees employed in a particular "craft" have the right to designate a particular union as the exclusive bargaining representative for all employees in that craft.[22] Under section 2, Eleventh, the exclusive representative is entitled to negotiate collective bargaining agreements that require union "membership" as a condition of employment.[23] In all material respects, section 2, Fourth and section 2, Eleventh are identical in language, scope, and operation to section 9(a) and section 8(a)(3) of the NLRA.[24]

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[21] 45 U.S.C. §§ 151-188.

[22] 45 U.S.C. § 152, Fourth.

[23] 45 U.S.C. § 152, Eleventh.

[24] 29 U.S.C. §§ 158(a)(3), 159(a).

In *Railway Employes' Dep't* v. *Hanson*, the plaintiffs claimed that a union shop provision negotiated under the authority of section 2, Fourth, and section 2, Eleventh violated their First Amendment rights.[25] The Court found that plaintiffs had stated a constitutional cause of action.[26] The Court avoided the constitutional issue by construing section 2, Eleventh as authorizing only agreements that require dissenting employees to pay union dues to the extent those dues relate "to the work of the union in the realm of collective bargaining."[27] The Court concluded that Congress, pursuant to its authority under the Commerce Clause, could require the financial support of the bargaining agent by all who "receive the benefit of its work."[28] Though finding the challenged provisions of the RLA to be constitutionally valid, the Court cautioned that, "[i]f the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case."[29] "[T]hat case" came before the Court five years later in *Int'l Ass'n of Machinists* v. *Street*.[30]

Instead of attacking the constitutionality of section 2, Eleventh, the plaintiffs in *Street* objected to the use of their compulsory dues for political purposes.[31] The Court stated that "the record [in *Street*] is adequate squarely to present the constitutional question reserved in *Hanson*."[32] The Court concluded that in enacting section 2, Eleventh, Congress had contemplated only the authorization of union shop provisions that "force[d] employees to share the costs of negotiating and administering collective agree-

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[25] 351 U.S. 225 (1956).

[26] 351 U.S. at 232.

[27] 351 U.S. at 235.

[28] 351 U.S. at 238.

[29] *Id.*

[30] 367 U.S. 740 (1961).

[31] 367 U.S. at 744.

[32] 367 U.S. at 749.

ments, and the costs of the adjustment and settlement of [contract] disputes."[33] Section 2, Eleventh was construed to "deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."[34]

In *Allen* v. *Bhd. of Ry. Clerks*, the Court reaffirmed its decision in *Street* and also gave additional instructions regarding the remedies available to dissenting employees.[35] Employees who do not choose to support a union can be charged their share of all union expenditures that are "germane" to collective bargaining.[36] A dissenting employee is entitled to restitution of any amount of his compulsory union dues that are used for politics and other activities that are not germane to collective bargaining and a reduction in that same percentage of future dues that he can be compelled to pay.[37]

Subsequent to the filing of this action, the principles announced in *Hanson*, *Street*, and *Allen* were applied to public-sector employees in *Abood* v. *Detroit Bd. of Educ.*[38] The district court in the instant case agreed with plaintiffs that the decisions under the RLA and in *Abood* are controlling on the issues raised by plaintiffs under the NLRA.[39] The district court ruled that collections by the CWA from objecting employees in an amount "beyond that allocable to collective bargaining, contract administration, and grievance adjustment" are violative of "the First Amendment

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[33] 367 U.S. at 764.

[34] 367 U.S. at 768-69.

[35] 373 U.S. 113 (1963).

[36] 373 U.S. at 121.

[37] 373 U.S. at 120, 121.

[38] 431 U.S. 209 (1977).

[39] The CWA also agreed that *Hanson*, *Street*, *Allen* and *Abood* were controlling until it filed a motion to dismiss the complaint almost six years after this case was filed. *Beck* v. *Communications Workers of Am.*, 776 F.2d 1187, 1191-1195 (4th Cir. 1985), *aff'd*, 800 F.2d 1280 (4th Cir. 1986).

rights of plaintiffs."[40] A special master was appointed to determine "what proportion of the union's total expenditures is attributable to activities other than collective bargaining, contract administration, and grievance adjustment."[41]

A final judgment was entered by the district court following two references to the special master, 4,000 pages of testimony, and the introduction into evidence of more than 3,000 documents.[42] Among the findings by the district court was a determination that *only twenty-one percent* of the agency fees collected from plaintiffs had been used by the CWA for collective bargaining, contract administration, and grievance adjustment and that plaintiffs are entitled to a refund of the remaining seventy-nine percent.[43]

Following the district court's entry of judgment, this Court issued *Ellis* v. *Bhd. of Ry. Clerks,* its fourth decision construing section 2, Fourth and section 2, Eleventh of the RLA.[44] The *Ellis* decision clarified the Court's rulings in *Hanson, Street, Allen,* and *Abood* in several important respects, two of which are of greatest importance to this appeal. First, the Court more precisely described the types of union expenditures non-union employees can be compelled to support. The proper test under section 2, Eleventh is whether the challenged expenditures "are necessarily or reasonably incurred for the purpose of [the union] performing the duties of an exclusive [bargaining] representative . . . ."[45] More importantly, this Court expressly ruled that the *First Amendment* prohibits *private-sector unions* from collecting fees from dissenting employees to the extent those fees are used for political and

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[40] *Beck,* 468 F.Supp. 93, 96 (D.Md. 1979).

[41] *Id.*

[42] *Beck,* 776 F.2d at 1194.

[43] *Beck,* No. M-76-839, slip op. (D.Md. Aug. 9, 1983).

[44] 466 U.S. 435 (1984).

[45] 466 U.S. at 448.

other activities that are not germane to collective bargaining.[46]

The CWA argues on appeal that plaintiffs have failed to state a claim upon which relief can be granted. The CWA concedes, as it must, that it cannot force the plaintiffs to become union members and that under the applicable collective bargaining agreements, plaintiffs can be compelled only to financially support the CWA.[47] The CWA does assert that because its authority derives from the NLRA as opposed to the RLA, Congress has granted it license, by virtue of its position as plaintiffs' exclusive bargaining representative, to spend plaintiffs' compulsory agency fees for politics and other purposes that have no relationship whatsoever to the performance of its duties as bargaining representative.[48]

On October 24, 1985, a panel of the fourth circuit voted 2 to 1 to affirm the district court's judgment, agreeing with "both the statutory and constitutional claims of plaintiffs."[49] On September 12, 1986, an *en banc* ruling was issued that reaffirmed the district court's decision in relevant part.[50]

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[46] *Id.* Based on the *Ellis* decision, remand of this case would seem necessary. In *Allen*, the Court ruled that unions, and not dissenting employees, must bear the burden of proving the proportion of plaintiffs' compulsory fees that is used for permissible activities. 373 U.S. at 122. In *Ellis*, this Court ruled that the union may meet this burden by the preponderance of the evidence. 466 U.S. at 457 n. 15. The special master applied the clear and convincing standard of proof in making the calculations the district court incorporated into its judgment. *Beck*, 776 F.2d at 1209-1213.

[47] *Pattern Makers League of N. Am.* v. *NLRB*, 473 U.S. 95 (1985).

[48] The CWA has apparently conceded that if plaintiffs have in fact stated a claim, the standards for permissible expenditures established by *Ellis* are controlling.

[49] *See infra* n. 50.

[50] *Beck*, 776 F.2d 1187 (4th Cir. 1985), *aff'd*, 800 F.2d 1280 (4th Cir. 1986) (en banc). Six of the judges of the fourth circuit voted to sustain federal jurisdiction while four voted to dismiss the case. All of the judges in the majority sustained plaintiffs' argument

SUMMARY OF ARGUMENT

While the First Amendment protects against state or governmental action and not from wrongs done by individuals, plaintiffs have stated a cause of action under the First Amendment. The provisions of the collective bargaining agreement challenged by plaintiffs must be attributed to the government since the express public policy of the United States encourages the process of collective bargaining.

The NLRA grants a certified collective bargaining representative the statutory right to serve as the exclusive representative for all employees in a bargaining unit. The powers exercised by a certified representative have been *expressly created by Congress* and are comparable to powers possessed by a legislature. The statutory privilege of exclusive representation operates to "extinguish" an employee's common law right to negotiate his own employment contract. Employees are compelled by Section 9(a) of the NLRA to associate with a union to the extent employees must accept a union as their bargaining representative. Section 9(a) is the source of the power by which the rights of private-sector employees are lost.

Collective bargaining is also encouraged by the federal government in three other significant ways under the NLRA. First, the NLRB often plays an active and essential role in the actual formation of a collective bargaining representative. Second, employers and collective bargaining representatives do not voluntarily select the topics that must be negotiated. Instead, employers are required by federal law to negotiate over wages, hours and other terms and conditions of employment known as mandatory subjects of bargaining. Whether a particular subject is a

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that CWA had breached its duty of fair representation. The court split 5 to 5 on whether section 8(a)(3) prohibits agreements that condition employment on the payment of agency fees in an amount equal to union dues. Two judges voted to sustain plaintiffs' constitutional claims. Five judges voted to dismiss the constitutional claims, while three found it unnecessary to decide them.

"mandatory" subject of bargaining is a question of federal law that is ultimately decided by the NLRA and the federal courts. Finally, the General Counsel of the NLRB has been given *exclusive* authority to enforce the statutory privileges granted to collective bargaining representatives by the NLRA.

The collective bargaining agreements challenged by plaintiffs have been negotiated as a result of significant "encouragement" by the federal government and therefore must be attributed to the state. Any interference with plaintiffs' First Amendment rights resulting from the requirement that plaintiffs accept the CWA as their bargaining representative is justified by the Congressional finding that collective bargaining enhances industrial peace. Congress has also found that industrial peace is enhanced to the extent all employees who share in the "benefits" of collective bargaining are required to share in the expenses associated with collective bargaining. No possible governmental interest can be served by requiring employees to support financially the political activities of a union as a condition of employment.

Apart from plaintiffs' constitutional claims, section 8(a)(3) of the NLRA should be given the same interpretation this Court has given to section 2, Eleventh of the RLA. Section 2, Eleventh is based on section 8(a)(3) and was enacted by Congress to give unions under the RLA the same rights granted to unions under the NLRA. Both the RLA and the NLRA were enacted to enhance industrial peace through the process of collective bargaining. The policy underlying both section 8(a)(3) and section 2, Eleventh is to eliminate the problem of the "free-rider"—employees who receive the "benefits" of collective bargaining, but who refuse to share in the related expenses. It is inconceivable that two federal statutes could be found that are more similar or that section 8(a)(3) could be interpreted differently from section 2, Eleventh.

Application of the standards established in *Street* and *Ellis* is also consistent with traditional canons of statutory

construction. Plaintiffs' rights under section 7 of the NLRA to refrain from union activity will be rendered completely inoperative if the petitioner is authorized by section 8(a)(3) to use plaintiffs' compulsory union dues to support candidates and causes opposed by plaintiffs. In contrast, the policies underlying both section 7 and section 8(a)(3) will be effectuated by application of the *Street* and *Ellis* standards to section 8(a)(3). The problem of the "free-rider" will be eliminated if section 8(a)(3) is interpreted as authorizing agreements that require dissenting employees to share in the costs of collective bargaining, while the right to refrain from union activity under section 7 will retain its significance if plaintiffs cannot be forced to subsidize petitioner's political activities as a condition of employment.

ARGUMENT

I. Plaintiffs have stated a cause of action under the First Amendment

The First Amendment protects against state or governmental action and not against wrongs done by individuals.[51] A finding of "state action" is therefore essential to plaintiffs' First Amendment claim.[52] When private parties are charged with constitutional violations, state action exists only when "the conduct allegedly causing the deprivation of a federal right [may] be fairly attributed to the state."[53] Private conduct may be fairly attributed to the state only when the state "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice in law must be deemed that of the state."[54]

Both the CWA and the Solicitor General of the United States argue that section 8(a)(3) merely permits employers and collective bargaining agents to agree on agency shop and that such provisions cannot therefore be attributed to

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[51] *United Bhd. of Carpenters* v. *Scott*, 463 U.S. 825, 831 (1983).

[52] *Hudgens* v. *NLRB*, 424 U.S. 507, 513 (1976).

[53] *Lugar* v. *Edmonson Oil Co.*, 457 U.S. 922, 937 (1982).

[54] *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982).

the government. This argument is divorced from reality and overly simplistic. The NLRA does provide that the obligation to engage in collective bargaining "does not compel either party to agree to a proposal or require the making of a concession." [55] However, it is not *the employer* who is required to pay union dues pursuant to a contract the employer has negotiated with a union. Union dues must instead be paid by employees who *are not parties to the contract* and who may have voted against the union or have otherwise been included in the relevant bargaining unit against their will.

Neither the CWA nor the Solicitor General explain or analyze the concept of collective bargaining, the way in which a collective bargaining representative is formed, the powers exercised by a collective bargaining representative, the source of the powers exercised by a collective bargaining representative, or the reasons why employers "choose" to negotiate agency shop or any other matter with collective bargaining representatives. The answers to these questions demonstrate that the operation of the NLRA as a whole, and not simply section 8(a)(3) taken out of context, provides the requisite governmental action upon which plaintiffs' constitutional claims are based.

Collective bargaining, as it has *affected the plaintiffs in this case*, is a creature of federal law.[56] The NLRA was enacted to eliminate what Congress perceived as "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms . . . ." [57] In order to remedy this perceived imbalance, Congress declared that it is the "policy of the United

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[55] 29 U.S.C. § 158(d).

[56] The fact that unions and employers may have been free in some states to negotiate union or closed shop agreements prior to 1935 does not negate the coercive foundation provided by the federal government for the contracts challenged by plaintiffs.

[57] 29 U.S.C. § 151.

States" to "[e]ncourage the practice and procedure of collective bargaining . . . ." [58] The NLRA "encourages" collective bargaining by limiting rights enjoyed at common law by employees and employers and by creating statutory rights for *unions* that have been certified by the NLRB as collective bargaining representatives.

Collective bargaining agreements negotiated under the authority of the NLRA (or the RLA) are not the result of purely private and voluntary decisions. They are quite unlike other contracts since one of the parties, the employer, is often brought to the bargaining table by the force of federal law. Once at the bargaining table, employers are required by federal law "to bargain collectively" with a "collective bargaining representative." [59] Federal law also requires that the topics of negotiation must include "wages, hours, and other terms and conditions of employment" and other mandatory subjects of bargaining, including agency shop.[60]

Certified collective bargaining representatives enjoy privileges that would not exist as a *matter of right* apart from the NLRA. Foremost is the statutory right under section 9(a) to serve as the exclusive representative for all the employees in the bargaining unit.[61] Section 9(a) is identical in all material respects to section 2, Fourth of the RLA.[62] By making bargaining representatives under both the NLRA and the RLA the exclusive representatives for all of the employees in the respective bargaining units or crafts, "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." [63]

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[58] *Id.*

[59] *See* 29 U.S.C. §§ 158(a)(5), 158(d).

[60] *See supra* at 4, 5.

[61] 29 U.S.C. § 159(a).

[62] 45 U.S.C. § 152, Fourth.

[63] *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192, 198, 202 (1944); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967).

While federal law acts as a source of rights and privileges for unions, the NLRA operates to *eliminate* certain basic rights and privileges that would otherwise be enjoyed by employees. At common law, "*any individual* or group of individuals have a right to work for whom they please, either individually or collectively, and to contract in any manner they see fit and proper."[64] The federal policy of exclusive representation "*extinguishes* the individual employee's power to order his own relations with his employer and creates a power vested in the [collective bargaining] representative to act in the interest of all employees."[65] Thus, *without regard* to whether a collective bargaining agreement contains a "union shop" provision, federal law compels all employees in a bargaining unit to associate with a certified collective bargaining agent to the extent that all employees must accept it as their bargaining agent.

Private decisions will be attributed to the state when a federal statute is the source of the power and authority by which any private rights are lost or sacrificed.[66] The collective bargaining agreements challenged by plaintiffs were imposed on them pursuant to the statutory privilege of exclusive representation granted to the CWA by an act of Congress. Section 9(a) of the NLRA is the source of the power and authority by which plaintiffs' right to order their own contractual affairs has been lost, sacrificed, and "extinguished."[67]

The enforceability of collective bargaining agreements and the number of employees who would be subject to collective bargaining agreements would be geometrically re-

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[64] *The Citizens Co.* v. *Asheville Typographical Union, No. 263,* 187 N.C. 42, 49, 121 S.E. 31 (1924) (emphasis added); *see also NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 102 (1936) (McReynolds, J., dissenting); *Adair* v. *United States*, 208 U.S. 161 (1908).

[65] *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (emphasis added).

[66] *Railway Employes' Dep't* v. *Hanson*, 351 U.S. at 232, *quoting Steele* v. *Louisville & N.R. Co.*, 323 U.S. at 198-199, 204.

[67] *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. at 180.

duced absent the encouragement provided by the government under section 9(a) of the NLRA and section 2, Eleventh of the RLA.[68] However, the NLRA also operates to encourage the process of collective bargaining in several other important areas. First, as discussed above, under the NLRA, the federal government "encourages" collective bargaining by playing an active and essential role in the formation of a collective bargaining agent.[69] Second, employers and collective bargaining representatives do not voluntarily select the topics that must be negotiated. Employers are instead required by federal law to negotiate all mandatory subjects of bargaining, including agency shop.[70] Finally, the NLRA encourages collective bargaining by vesting in the General Counsel of the NLRB the *exclusive authority* to enforce the rights and privileges established by the NLRA.

Under section 8(a) of the NLRA, employers are prohibited from engaging in a list of enumerated "unfair labor practices." [71] Should a collective bargaining representative or any other person conclude that an employer has committed an unfair labor practice, their only recourse is to file an unfair labor practice charge with the General Counsel of the NLRB.[72] The General Counsel will dismiss the charge if she concludes that no violation has been committed. If the General Counsel concludes that an unfair labor practice has been committed, she or her agents will issue a complaint against the offending employer. The General Counsel has *unreviewable discretion* to decide whether a complaint will be issued and the unfair labor practice charges litigated.[73]

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[68] *See* Vieira, *Of Syndicalism, Slavery, and the Thirteenth Amendment: The Unconstitutionality of Exclusive Representation in the Public Sector*, 12 Wake Forest L.Rev. 515, 551-626 (1976).

[69] *See supra* at 2-4.

[70] *See supra* at 4, 5.

[71] 29 U.S.C. § 158(a).

[72] 29 U.S.C. § 160(b); E. Miller, *An Administrative Appraisal of the NLRB*, at 15-27 (Lab. Rel. & Pub. Pol'y Series No. 16, 1980).

[73] *Id.*; *see also Vaca* v. *Sipes*, 386 U.S. at 913.

If the General Counsel issues a complaint, she will attempt to prove the allegations before an administrative law judge. The decision by the administrative law judge may be appealed by either the General Counsel or the employer to the five-member National Labor Relations Board. Any adverse decision of the NLRB may be appealed by either party to a federal court of appeals. At all stages, the unfair labor practice charges are prosecuted by the General Counsel, including any action in the court of appeals to enforce an order by the NLRB directing the employer to cease and desist from unlawful conduct.[74]

It is within this reality that an employer "agrees" to engage in collective bargaining with a collective bargaining representative. Once a union is certified by the NLRB, an employer who refuses to engage in collective bargaining will be sued by the General Counsel of the NLRB.[75] Should the employer refuse to negotiate over the inclusion of an agency shop provision in a prospective collective bargaining agreement, he will be sued by the General Counsel of the NLRB.[76] Most importantly, should an agency or union shop provision be included in a collective bargaining agreement, and should an employee refuse to pay agency fees on the ground that portions of those fees are being used by the collective bargaining representative for political purposes, and should the employer refuse to discharge that employee, the employer will be sued by the General Counsel of the NLRB.[77] In such circumstances, the General Counsel

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[74] *See supra* n. 72. Union unfair labor practices are enumerated in section 8(b) of the NLRA, 29 U.S.C. § 158(b), and are investigated and processed by the General Counsel in the same fashion as employer unfair labor practices.

[75] *See supra* n. 7.

[76] *NLRB* v. *Gen. Motors Corp., supra; Caroline Farms Division of Textron, Inc.* v. *NLRB*, 401 F.2d 205 (4th Cir. 1968).

[77] *Montgomery Ward & Co., Inc.*, 162 NLRB 369 (1966). A union also has the option of suing an employer for breach of contract under section 301 of the NLRA, 29 U.S.C. § 185, if an employer refuses to force its employees to comply with any "membership" obligations contained in a collective bargaining agreement. *Modine*

will find herself engaged in the "sinful and tyrannical" act of "compel[ling] a man to furnish contributions of money for the propagation of opinions which he disbelieves."[78] Such conduct by the General Counsel must be prohibited under "our constitutional constellation" since "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[79]

This Court has previously acknowledged that the authority of bargaining agents under the RLA and the NLRA is based upon governmental action. "Grave constitutional problems" under section 9(a) of the NLRA and section 2, Fourth of the RLA were avoided by this Court's interpretation of both statutes in *Steele* v. *Louisville & N.R. Co.* and *Vaca* v. *Sipes.*[80] While finding that both sections were intended by Congress "to clothe the bargaining representative with powers comparable to those possessed by a legislature," the Court also ruled that Congress did not intend to "confer plenary power upon the union to sacrifice, for the benefit of its members, rights of the minority."[81] The Court avoided the "grave constitutional problems" by construing both statutes as imposing a duty on the bargaining representative to "fairly" represent all members of the bargaining unit.[82]

In *Railway Dep't Employes'* v. *Hanson,* the Court ruled that collective bargaining agreements negotiated under the RLA could be challenged on constitutional grounds if they

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Mfg. Co. v. *Grand Lodge Int'l Ass'n of Machinists,* 216 F.2d 326 (6th Cir. 1954).

[78] I. Brant, *James Madison: The Nationalist* 354 (1948) (quoting Thomas Jefferson) *cited in Abood,* 431 U.S. at 234 n. 31.

[79] *Abood,* 431 U.S. at 235, *quoting West Virginia Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 642 (1943).

[80] *Vaca* v. *Sipes,* 386 U.S. at 182 (interpreting section 9(a) of the NLRA), *citing Steele* v. *Louisville & N.R. Co.,* 323 U.S. at 198-199, 230-232 (interpreting Section 2, Fourth of the RLA).

[81] *Id.*

[82] *Id.*

contained union shop provisions. Citing its decision in *Steele* construing section 2, Fourth as authority, the Court stated that, "[t]he enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates . . . ."[83]

In *Abood* v. *Detroit Bd. of Educ.*, the Court was required to pass on the constitutionality of a collective bargaining agreement that contained an agency shop provision as it was applied to state employees.[84] The agreement was negotiated under the authority of a state statute the Court described as being modeled on both the RLA and *the NLRA*.[85] The Court rejected the argument that either collective bargaining or agency shop were unconstitutional in the public sector. The Court did conclude that agency shop in the public sector was subject to the same limitations fashioned in *Street* and *Allen*.[86] The Court observed that public-sector employees do not have "weightier First Amendment interest[s]" than private employees,[87] and also stated that:

> Public employees are not basically different from private employees . . . . The very real differences between exclusive-agent collective bargaining in the public and

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[83] 351 U.S. at 232. Petitioner argues that governmental action attaches to RLA collective bargaining agreements solely because the RLA "displaces" state right-to-work laws. The RLA does not contain a provision similar to section 14(b) of the NLRA, 29 U.S.C. § 164(b), and, as a result, state governments do not have the authority to prohibit union shop agreements in the railway or airline industries. Petitioner's argument does not contemplate the reality that agency shop agreements exist because of collective bargaining and that collective bargaining exists in the 1980s by virtue of section 9(a) of the NLRA and section 2, Fourth of the RLA. However, even petitioner's argument, if carried to its logical conclusion, supports a finding of state action. Both section 9(a) and section 2, Fourth operate to "displace" contrary state laws that would otherwise allow employees to negotiate their own contracts of employment. *See supra*, n. 64.

[84] 431 U.S. 209 (1977).

[85] 431 U.S. at 223.

[86] 431 U.S. at 237-242.

[87] 431 U.S. at 229.

> private sectors are not such as to work any greater infringement upon the First Amendment interests of public employees . . . .
>
> The differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights.[88]

The decision in *Abood* clearly states that *all* private-sector employees are entitled to the *same* protection afforded public-sector employees by the First Amendment. The Court's most recent decision interpreting section 2, Eleventh of the RLA further reinforces the conclusion that the First Amendment protections recognized for public sector and RLA employees apply with equal force to NLRA employees:

> The First Amendment does limit the uses to which the union can put funds obtained from dissenting employees [citation omitted]. But by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights.[89]

Whether an employee is employed by an employer within the jurisdiction of the RLA or the NLRA, the effect on him of a collective bargaining agreement that contains a union shop provision is identical. Under both circumstances, the dissenting employee "is forced to financially support an organization with whose principles and demands he may disagree."[90]

In 1980, Congress recognized the constitutional impact of Section 9(a) of the NLRA by enacting section 19 of the NLRA. Under section 19, any employee who is a member of a *bona fide* religion that has historically held conscientious objections to joining or financially supporting a union, cannot be required to join or support a union as a condition of employment.[91] Section 19 was viewed by its sponsors as effecting an accommodation of the rights of individual em-

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[88] 431 U.S. 229, 230, 232.

[89] *Ellis* v. *Bhd. of Ry. Clerks*, 466 U.S. at 455.

[90] *Id.*

[91] 29 U.S.C. § 169.

ployees to freedom of religion under the *First Amendment* and the statutory privileges that have been granted to collective bargaining agents.[92]

A finding of governmental action in this case will neither open a Pandora's box nor destroy our established system of labor relations. Congress has declared that the important governmental interest in industrial peace is furthered by collective bargaining. The sacrifice of individual rights resulting from exclusive representation and collective bargaining is therefore justified to the extent employees are compelled to accept a union as their collective bargaining agent.[93] Industrial peace is also enhanced to the extent that employees who share in the "benefits" of collective bargaining are required to share in the expenses associated with collective bargaining to eliminate the problem of the "free-rider."[94]

No governmental interest can possibly be served by compelling employees to subsidize a union's political activities. A union is able to compel financial support from dissenting employees only by virtue of its statutory status as exclusive representative. Because the conduct challenged by plaintiffs is directly related to the CWA's grant of "monopoly power" under Section 9(a), plaintiffs have stated a claim under the First Amendment.[95]

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[92] *See* 126 Cong. Rec. 2579-86, 2652-53, 34006-34007 (1980); H.R. Rep. No. 96-496, 96th Cong., 2d Sess. (1980).

[93] *J. I. Case Co.* v. *NLRB*, 321 U.S. 332, 337-39 (1944); *Abood*, 431 U.S. at 220-221.

[94] *Ellis*, 466 U.S. at 455; *Radio Officers' Union* v. *NLRB*, 347 U.S. at 41.

[95] *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 335, 352 (1974). In *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), the Court was called upon to determine the legality of an affirmative action plan that had been collectively bargained by an employer and a collective bargaining representative. The plaintiff contended that the plan violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Plaintiff *did not* contend that the plan violated the Equal Protection Clause of the Fourteenth Amendment and *did not* brief the issue of state action. *See Law Reprints Labor*

II. Section 8(a)(3) of the NLRA should be given the same construction this Court has given Section 2, Eleventh of the RLA

It is a "cardinal principle" of statutory construction that this Court will ascertain whether a construction of a statute is "fairly possible" by which any constitutional questions may be avoided.[96] Two different statutes should be given the same construction when they share the same purpose and the same language, and when the legislative history shows that one of the statutes was the source for the other.[97] These principles of statutory construction have special significance here since "it would be difficult, if not impossible, to find two statutes more identical in language and legislative purpose than section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA."[98]

Both the NLRA and the RLA were enacted to facilitate the free flow of commerce and to enhance industrial peace through the process of collective bargaining.[99] The collective bargaining process under both statutes rests upon the concept of exclusive representation.[100] Both section 9(a) and section 2, Fourth "extinguish" the right of an individual employee to order his own employment relationship. Under section 8(a)(3) and section 2, Eleventh, unions

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Series, Vol. 12, no. 13, '78, '79 Term, Brief for the Respondents in *United Steelworkers* v. *Weber*, at 417, 474. Despite the fact that plaintiff had not raised the issue, the Court stated *sua sponte* that since "the . . . plan does not involve state action, this case does not present an alleged violation of the Equal Protection Clause . . . ." 443 U.S. at 193. To the extent this statement is incompatible with the position asserted by the *amicus curiae*, it is also equally in conflict with the Court's rulings in *Steele*, *Hanson*, *Street*, *Allen*, *Allis-Chalmers*, *Vaca*, *Abood*, and *Ellis*.

[96] *Street*, 367 U.S. at 749, *quoting Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

[97] *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979); *Northcross* v. *Bd. of Educ. of Memphis City Schools*, 412 U.S. 427, 428 (1973).

[98] *Beck*, 776 F.2d at 1187.

[99] 29 U.S.C. § 151; 45 U.S.C. § 151a; *Street*, 367 U.S. at 760.

[100] 29 U.S.C. § 159(a); 45 U.S.C. § 152 Fourth.

and employers are granted the statutory authority to negotiate agreements that require "membership" as a condition of employment.[101]

Section 8(a)(3) was added to the NLRA in 1947 by the Taft-Hartley Act.[102] The purpose of section 8(a)(3) was to eliminate the perceived problem of the "free-rider." Congress concluded that NLRA unions should be allowed to seek agreements that require "membership" as a condition of employment so that all employees who enjoy the "benefits" of collective bargaining also share in the costs of the bargaining process.[103]

Prior to 1950, Congress had denied railway unions the authority to negotiate union shop agreements.[104] Congress responded to the petitions of railway unions that they be accorded the *same privileges* enjoyed by unions under the NLRA by enacting section 2, Eleventh.[105] In drafting section 2, Eleventh, Congress "tracked the language of section 8(a)(3) of the Taft-Hartley Act."[106] The legislative history of section 2, Eleventh is replete with representations that the intent of Congress was to confer on railway unions the *same* rights enjoyed by unions under section 8(a)(3) of the NLRA.[107]

Neither section 8(a)(3) nor section 2, Eleventh limit or qualify on their face the types of "membership" that can be required under collective bargaining agreements.

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[101] 29 U.S.C. § 158(a)(3); 45 U.S.C. § 152 Eleventh.

[102] 61 Stat. 136 (1947).

[103] *Beck*, 776 F.2d at 1196; S.Rep. No. 105, 80th Cong., 1st Sess. 6-7 (1947); Legislative History of the Labor-Management Relations Act, 1947, at 413, 1422 (1948) (statements of Senator Taft); *NLRB* v. *General Motors Corp.*, 373 U.S. at 740-41; *Radio Officers' Union* v. *NLRB*, 347 U.S. at 41.

[104] *Street*, 367 U.S. 750-764; *Beck*, 776 F.2d at 1197.

[105] 67 Stat. 1238 (1951).

[106] *Beck*, 737 F.2d at 1197, *citing* T. Haggard, *supra* n. 14.

[107] *Id.*; *See also* 96 Cong.Rec. 15,737, 16,267 (1950); S.Rep.No. 2262, 81st Cong., 2d Sess. 3, 5 (1950); H.R.Rep.No. 2811, 81st Cong., 2d Sess. 405 (1950).

Nonetheless, in *Radio Officers' Union* v. *NLRB*, this Court squarely held that formal membership could not be required under section 8(a)(3):

> [The] legislative history [of the Taft-Hartley Act and section 8(a)(3)] clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders," i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and *gave unions the power to contract to meet that problem* . . . .[108]

The effect of the Court's decision in *Radio Officers Union* was to "whittle" the definition of membership under section 8(a)(3) to its financial core.[109] The limits to financial "membership" under section 2, Eleventh were established by the Court's decision in *Street*:

> The conclusion to which [a review of the legislative history of section 2, Eleventh] clearly points is that § 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes. One looks in vain for any suggestion that Congress also meant in § 2, Eleventh to provide unions with a means for forcing employees, over their objection, to support political causes which they oppose.[110]

This Court has never had the opportunity, before the instant case, to explain the limits to financial "membership" under section 8(a)(3). The RLA and the NLRA are both designed to accomplish the same essential purpose (the enhancement of industrial peace through the process of collective bargaining). The language selected by Congress for section 2, Eleventh tracks the language of section 8(a)(3). Since both section 8(a)(3) and section 2, Eleventh were enacted to give collective bargaining repre-

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[108] 347 U.S. at 41 (emphasis added).

[109] *NLRB* v. *General Motors Corp.*, 373 U.S. at 742.

[110] 367 U.S. at 363, 364.

sentatives "the power" to meet the "problem" of the "free-rider," "[i]t is inconceivable that [the] two statutes would be construed differently."[111]

For purposes of statutory construction, legislative observations made years after the enactment of a statute are in no sense part of the legislative history.[112] It is still worth bringing to the Court's attention that members of Congress also find it "inconceivable" that this Court's interpretation of section 2, Eleventh does not also apply to section 8(a)(3). Legislation has been offered in both the House of Representatives and the United States Senate to amend the Federal Election Campaign Act of 1971 ("FECA"), to prohibit the use of compulsory union dues for political purposes.[113] Amendments to the FECA have been defeated on the express ground that the proposed legislation is unnecessary since the decisions in *Street, Allen, Abood,* and *Ellis* have already restricted the uses to which compulsory dues can be put under the NLRA.[114]

Particular provisions of a statute must be interpreted so that other provisions of the same statute are not rendered inoperative.[115] Statutory phrases will not be construed in isolation, but instead will be interpreted within the context of the whole statute.[116] Congress intended to enhance the free flow of interstate commerce when it enacted the NLRA

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[111] *Beck,* 776 F.2d at 1197, 1198.

[112] *Oscar Mayer & Co.* v. *Evans,* 441 U.S. at 758.

[113] 2 U.S.C. §§ 431-455.

[114] 130 Cong. Rec. 6178-81 (daily ed. May 22, 1984); 132 Cong. Rec. 5553-54 (daily ed. Aug. 6, 1986); *see also* Appendix, at 7a-29a (Letters of the following Members of Congress to Constituents: Senator Patrick J. Leahy; Senator John H. Chafee; Senator Christopher J. Dodd; Senator Mark Hatfield; Representative Robin Tallon; Representative Nancy L. Johnson; Representative Robert W. Kastenmeier; Representative Bill Hefner; Representative Bill Richardson; Representative Gerald D. Kleczka; and Representative Richard H. Lehman).

[115] *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana,* 472 U.S. 237 (1985); *Colautti* v. *Franklin,* 439 U.S. 379, 392 (1979).

[116] *United States* v. *Morton,* 467 U.S. 822, 828 (1984).

by "encouraging" both the process of collective bargaining *and* "the exercise by workers of full freedom of association." [117] Congress encouraged the exercise of full freedom of association by enacting Section 7 of the NLRA.[118] Section 7 grants employees the statutory right to engage in union activity *and* the statutory right to *refrain* from union activity. The right to refrain from union activity has been limited only "to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [section 8(a)(3)] . . . ." [119]

Several conclusions must be drawn from a reading of section 7 of the NLRA. The statutory right to refrain from union activity cannot be reduced or burdened merely because of an agreement reached between an employer and a collective bargaining representative. Instead, the only permissible limits that can be placed on the right to refrain from union activity are those limitations that have been expressly authorized by Congress under section 8(a)(3). Any union security agreement that goes beyond the "membership" obligations authorized by section 8(a)(3) is therefore prohibited by section 7.

Petitioners argue that section 8(a)(3) grants unions the authority to negotiate collective bargaining agreements that require dissenting employees to support union political activities as a condition of employment. Such an interpretation renders section 7 completely inoperative as it relates to individual employees like the plaintiffs who have been placed in a bargaining unit without their consent and who have had a bargaining agent imposed on them under the authority of federal law. Petitioners cannot rationally argue that the NLRA operates to "encourage" full freedom of association" if employees who find themselves in the same circumstances as plaintiffs can be forced under the au-

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[117] 29 U.S.C. § 151.

[118] 29 U.S.C. § 157.

[119] *Id.*

thority of section 8(a)(3) to support candidates and causes they violently oppose.

In contrast, application of the *Street - Ellis* principles to the NLRA will effectuate the policies underlying both section 7 and section 8(a)(3) by giving both sections "the most harmonious, comprehensive meaning possible." [120] The "problem" of the "free-rider" will be eliminated if section 8(a)(3) is interpreted as authorizing agreements that require dissenting employees to share in the costs of collective bargaining. In addition, the statutory right to refrain from union activity and the intent of Congress to encourage "full freedom of association" will be vindicated if dissenting employees cannot be compelled under the authority of section 8(a)(3) to subsidize political activities as a condition of employment.

CONCLUSION

The relief sought by plaintiffs is neither trivial nor unique. James Madison, the author of the First Amendment, wrote in defense of religious liberty, "[w]ho does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" [121] The principle that all Americans should be free to choose the groups and political causes they support is basic to our concept of individual liberty. Hundreds of thousands, possibly millions, of employees have since 1935 been forced under authority of federal law to subsidize the political activities of the CWA and other unions. By sustaining the decision below, this Court will restore to plaintiffs and countless other employees fundamental freedoms that are their birthright as American citizens.

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[120] *Weinberger* v. *Hynson, Wescott, and Dunning, Inc.*, 412 U.S. 609, 633 (1973).

[121] 2 *The Writings of James Madison* 186 (Hunt ed. 1901), *quoted in Abood*, 431 U.S. at 234 n. 31.

Respectfully submitted,

*THOMAS A. FARR
W. W. TAYLOR, JR.
ROBERT A. VALOIS
MAUPIN TAYLOR ELLIS & ADAMS, P.A.
3201 Glenwood Avenue
Raleigh, North Carolina 27612
Telephone: (919) 781-6800

Counsel for Senators Jesse Helms, et al., *as* amicus curiae

**Counsel of Record*

FORM NLRB-502
(5-85)

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

PETITION

DO NOT WRITE IN THIS SPACE	
Case No.	Date Filed

INSTRUCTIONS: Submit an original and 4 copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located. If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

1. PURPOSE OF THIS PETITION *(If box RC, RM, or RD is checked and a charge under Section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)* **(Check One)**

☐ **RC-CERTIFICATION OF REPRESENTATIVE** - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.

☐ **RM-REPRESENTATION (EMPLOYER PETITION)** - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.

☐ **RD-DECERTIFICATION** - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.

☐ **UD-WITHDRAWAL OF UNION SHOP AUTHORITY** - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

☐ **UC-UNIT CLARIFICATION** - A labor organization is currently recognized by Employer, but Petitioner seeks clarification of placement of certain employees: *(Check one)* ☐ In unit not previously certified. ☐ In unit previously certified in Case No. _____.

☐ **AC-AMENDMENT OF CERTIFICATION** - Petitioner seeks amendment of certification issued in Case No. _____
Attach statement describing the specific amendment sought.

2. Name of Employer	Employer Representative to contact	Telephone Number

3. Address(es) of Establishment(s) involved *(Street and number, city, State, ZIP code)*

4a. Type of Establishment *(Factory, mine, wholesaler, etc.)*	4b. Identify principal product or service

5. Unit Involved *(In UC petition, describe* **present** *bargaining unit and attach description of proposed clarification.)*	6a. Number of Employees in Unit:
Included	Present
	Proposed *(By UC/AC)*
Excluded	6b. Is this petition supported by 30% or more of the employees in the unit? * ___ Yes ___ No *Not applicable in RM, UC, and AC

(If you have checked box RC in 1 above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a ☐ Request for recognition as Bargaining Representative was made on *(Date)* _____ and Employer declined recognition on or about *(Date)* _____ *(If no reply received, so state).*

7b ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8. Name of Recognized or Certified Bargaining Agent *(If none, so state)*	Affiliation
Address and Telephone Number	Date of Recognition or Certification

9. Expiration Date of Current Contract, If any *(Month, Day, Year)*	10. If you have checked box UD in 1 above, show here the date of execution of agreement granting union shop *(Month, Day, and Year)*

11a. Is there now a strike or picketing at the Employer's establishment(s) Involved? Yes _____ No _____	11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of *(Insert Name)* _____, a labor organization, of *(Insert Address)* _____ Since *(Month, Day, Year)* _____

12. Organizations or individuals other than Petitioner *(and other than those named in items 8 and 11c)*, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in unit described in item 5 above. *(If none, so state)*

Name	Affiliation	Address	Date of Claim *(Required only if Petition is filed by Employer)*

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

_____
(Name of Petitioner and Affiliation, if any)

By _____ _____
(Signature of Representative or person filing petition) *(Title, if any)*

Address _____ _____
(Street and number, city, State, and ZIP Code *(Telephone Number)*

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE ...

BEST AVAILABLE COPY

3a

UNITED STATES OF AMERICA
National Labor Relations Board

FORM NLRB-707N2 (RC, RM, RD CASES) (4-84)

OFFICIAL SECRET BALLOT

For certain employees of

Do you wish to be represented for purposes of collective bargaining by -

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

YES	NO
☐	☐

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
If you spoil this ballot return it to the Board Agent for a new one.

3a

FORM NLRB-4278
(10-84)

[redacted]-RD

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

[redacted]

TYPE OF ELECTION
(CHECK ONE)

- ☐ CONSENT
- ☐ STIPULATED
- ☐ RD DIRECTED
- ☐ BOARD DIRECTED

(ALSO CHECK BOX BELOW WHEN APPROPRIATE)

- ☐ 8(b)(7)

CASE

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board,

It is certified that a majority of the valid ballots have been cast for

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit.

UNIT:

Signed at
On the day of 19

Regional Director, Region
National Labor Relations Board

5a

6a

PATRICK J. LEAHY
Vermont

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
Washington, D.C. 20510

August 19, 1982

Mr. Karl H. Asbeck
P.O. Box 207
East Barre, VT 05649

Dear Mr. Asbeck:

Thank you for letting me know you oppose the use of union dues to support political candidates and causes.

You may be interested to know that current law supports your views that union dues should not be used to make contributions to political candidates. Furthermore, unions do not have the authority to use an employee's dues to support political causes he or she opposes, over the employee's objection. The Supreme Court has ruled that the unions must set up internal procedures so that those employees who object to having their dues used for political purposes may obtain a proportional refund.

Of course, if any amendments do come up in the Senate, I will consider each on its own merits and keep your views in mind.

Again, thank you for contacting me. I hope you will keep in touch on matters of concern to you.

Sincerely,

/s/ PATRICK J. LEAHY
PATRICK J. LEAHY
United States Senator

PJL/hsh

JOHN H. CHAFEE
Rhode Island

UNITED STATES SENATE

September 14, 1982

Mr. George Dansereau
132 Putnam Avenue
Johnston, Rhode Island 02919

Dear Mr. Dansereau:

Thank you for writing to express your support for legislation to amend the Federal Election Campaign Act to prohibit the use of union dues for political purposes.

I believe that present federal labor laws—which are based on open elections and majority rule and which expressly prohibit excessive union dues—adequately protect employees from the misuse of their dues or fees. Thus, I oppose the proposed alterations to the Federal Election Campaign Act.

Thank you again for taking the time to write.

Sincerely,

/s/ JOHN H. CHAFEE
JOHN H. CHAFEE
United States Senator

JHC/des

CHRISTOPHER J. DODD
Connecticut

UNITED STATES SENATE
Washington, D.C. 20510

June 1, 1984

Mr. Paul R. Bourdeau
19 Valley View Drive, RR 1
New Milford, Connecticut 06776

Dear Mr. Bourdeau:

Thank you for contacting me regarding your support for the Helms Amendment to H.R. 5164.

On May 22, 1984, the Senate voted to table this amendment by a vote of 65-32. I opposed the amendment for two reasons. First, in a decision issued on April 25, 1984, the Supreme Court upheld the rights of union members who dissent from their union's political activities by holding that such dissenters are entitled to an *advance* reduction of that portion of their dues used for purposes other than collective bargaining. Thus, the major intent of the amendment has already been accomplished. Secondly, the amendment would prohibit political activities only by certain labor unions and not at all by corporations, which in my view would undo the balance between business and labor intended under the Federal Election Campaign Act.

While we disagree on this particular issue, I hope you will continue to advise me on other issues of concern, and will not hesitate to let me know if I may be of any assistance.

Again, my thanks for sharing your views on this matter.

Sincerely,

/s/ CHRISTOPHER J. DODD
CHRISTOPHER J. DODD
United States Senator

CJD/pag

MARK O. HATFIELD

UNITED STATES SENATE
Washington, D.C. 20510

July 3, 1986

Mr. and Mrs. M.J. Olsen
1650 China Gulch Road
Jacksonville, Oregon 97530

Dear Mr. and Mrs. Olsen:

Thank you for your recent correspondence.

The allegation that current federal election law permits unions to use compulsory union dues for political purposes has been the source of great objections to the Federal Election Campaign Act. I examined this issue carefully in preparation for debate on legislation reauthorizing the F.E.C.A. I had hoped that time would be given in the 98th Congress for the Senate Rules Committee, on which I serve, to hold hearings on this matter in order to obtain a better understanding of all the problems involved. But advocates of Senator Helms' "union dues" legislation, S. 1881, insisted upon its consideration on the Senate floor without prior hearings.

It is clear to me that the issue of "right to work" legislation and union political activity should be separated. I would not support a bill if its intent was simply to neutralize unions. Unions have as much right as any other group to speak out on issues and to promote their point of view.

At issue was the use of compulsory dues to do so. My study of the issue led me to conclude that this does not take place. The Federal Election Campaign Act specifically prohibits labor organizations from using union dues for political activity. They are required to set up separate political action committees (PACs) funded through a separate and

voluntary dues structure. However, labor organizations, professional associations, corporations and groups representing particular interests *can* use general funds to communicate, educate and activate members or shareholders.

Information and education of membership is a primary responsibility of unions and other associations and, should they cease that effort, they would not survive. Of course, there will be members who disagree with the decision made by the majority. The courts have interpreted federal law as requiring unions to offer a rebate to agency shop members who disagree with the political views expressed in the unions' educational materials. A disgruntled member may dissent, apply for, and receive, a rebate equal to the percentage of dues used for political education. Generally, this is accomplished by a letter to the union leadership. Therefore, the concerns being expressed over the political use of compulsory union dues have been addressed by current law.

I remain hopeful that committee hearings will be held on this issue, if it remains a concern during the 99th Congress, before legislation comes to the full Senate for consideration.

Thank you for taking the time to contact me.

Kind regards.

Sincerely,

/s/ MARK O. HATFIELD
MARK O. HATFIELD
United States Senator

MOH/snw
14177-14182

MARK O. HATFIELD

UNITED STATES SENATE
Washington, D.C. 20510

July 23, 1987

Mr. Luis Brillas
17800 N.E. Chehalem Drive
Newberg, Oregon 97132

Dear Mr. Brillas:

The Public Service Research Council recently sent me your petition opposing S. 2, the Campaign Finance Reform Bill, and the use of compulsory union dues for political purposes. I appreciate this opportunity to share with you my views on these two topics.

After three days of hearings on S. 2, legislation to make changes in federal election campaign law, both Democrats and Republicans on the Senate Rules Committee felt that changes were needed in the bill. However, as I had suspected, there was no agreement on the nature that those changes should take. Republicans proposed a substitute amendment which reduced maximum PAC contributions and increased maximum individual contributions, both, to $2500 per election per candidate; established disincentives to negative independent expenditures that require costly responses by candidates; and increased limits on the contributions that political parties can make to candidates. The substitute eliminated the public financing provision.

This substitute was defeated on a party-line vote on April 29. The Committee then passed the Democrat substitute to S. 2 and reported the measure to the Senate. I voted against the Democratic substitute, not for partisan reasons, but because the bill fails to reduce the current PAC contribution limits, and included tax-supported financing of Senate elections. The Federal Election Commission estimated that public financing will cost the U.S. Treasury

approximately $87 million in the 1988 election cycle. Adding House elections to the program would cost a total of approximately $350 million.

The hearings on S. 2 did not demonstrate to my satisfaction that the current system of campaign financing distorts our political system in a manner worthy of the kind of public expenditures proposed in the bill. Prior to 1971 corporations, labor unions and other associations contributed to candidates in a manner that posed the threat of undue influence over candidates. The present system of funneling all contributions through political action committees set up by these organizations, limiting their contributions, and requiring disclosure of them, was enacted at the urging of groups such as Common Cause to eliminate this influence.

The new contribution rules have worked well, particularly in making clearly available to the public the source of all funds collected by a candidate. But the reforms of 1971 did not slow the ballooning of total campaign costs which have made it necessary for candidates to raise increasingly large amounts of funds for campaigning. Providing public funds does nothing to reduce the upward pressure on these costs—it only provides tax dollars to meet the need.

The biggest expense of modern campaigns is media advertising and political consultant costs (polling). The Republican substitute included a provision for lowest cost media time to be provided to candidates as part of broadcasters' public service responsibilities. It also contained disincentives for the expenditure of large amounts of personal funds by wealthy candidates.

S. 2 is now being debated on the Senate floor where many of the amendments proposed in Committee are being proposed. I will give each my careful attention and keep in mind the many comments I have received about our federal election process.

The allegation that current federal election law permits unions to use compulsory dues for political purposes has been the source of great objections to the Federal Election Campaign Act. Legislation to prohibit current practices, S. 615, has been introduced by Senator Helms. I have examined this issue carefully as a result of the concern it has generated.

It is clear to me that the issues of "right to work" legislation and union political activity should be separated. I would not support legislation if its intent was simply to neutralize unions. Unions have as much right as any other group to speak out on issues and to promote their point of view.

At issue is the use of compulsory dues to do so. My study of the issue leads me to conclude that this does not take place. The Federal Election Campaign Act specifically prohibits labor organizations from using union dues for political activity. They are required to set up separate political action committees (PACs) funded through a separate—and voluntary—dues structure. However, labor organizations, professional associations, corporations and groups representing particular interests *can* use general funds to communicate, educate and activate members or shareholders.

Information and education of membership is a primary responsibility of unions and other associations and, should they cease that effort, they would not survive. Of course, there will be members who disagree with decisions made by the majority. The courts have interpreted federal law as requiring unions to offer a rebate to agency shop members who protest political education activities of the union. While candidate donations are made through the PAC, education, as mentioned above, can be funded through union dues. It is to this expenditure that a disgruntled member may dissent, apply for, and receive, a rebate equal to the

percentage of dues used for political education. Generally, this is accomplished by a letter to the union leadership.

For these reasons, I do not support S. 615.

Thank you again for writing. I appreciate your taking the time to share your views with me.

Kind regards.

Sincerely,

/s/ MARK O. HATFIELD
MARK O. HATFIELD
United States Senator

MOH/trp

ROBIN TALLON
6th District, South Carolina
CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, DC 20515

October 7, 1985

Mr. Jack E. Buttram
38 Valerie Drive
Greenville, SC 29615

Dear Mr. Buttram:

Thank you for your recent letter regarding the use of compulsory union dues for political purposes.

You and many others throughout South Carolina have been erroneously informed that I oppose right-to-work legislation. A great deal of misinformation has been disseminated regarding my position on this matter. I would like to make clear that there have been no votes on any amendment offered by Congressman Cobey, or anyone else, requiring that the Federal Elections Commission (FEC) implement the Supreme Court decision in *Ellis v. Brotherhood of Railroad and Airline Clerks.*

A certain amount of background information is necessary to fully understand this issue. Workers who are not union members receive the same benefits from collective bargaining agreements as their coworkers who are union members. In certain instances, these non-union members are required to pay fees in lieu of dues.

According to the federal elections law, corporations and unions are permitted to organize political action committees and may distribute a newsletter to its employees or membership only which advocates one candidate or position over another. Unions and corporations may not make contributions to candidates or political parties and may not

make any independent expenditures on behalf of any particular party or candidate except to inform exclusively its own employees or membership.

Because political advocacy is not directly related to collective bargaining, the Supreme Court ruled that non-union members who paid fees in lieu of dues are entitled to a partial refund if some of those funds were used for advocacy. It is the legal responsibility of the unions to comply with this Supreme Court ruling.

During consideration of the Treasury, Postal and General Government Appropriations bill a Point of Order was sustained against an amendment requiring the Federal Elections Commission to enforce the Supreme Court's decision. It is a violation of the Rules of the House of Representatives to include such an amendment in an appropriations bill. These matters can only be considered in an authorization bill.

My vote on a procedural motion to allow the House of Representatives to later vote on final passage of the bill is being misrepresented to you as a vote on the actual amendment requiring FEC enforcement of the *Ellis* decision. Let me stress that a vote on the amendment itself never took place.

I have always been a strong supporter of right-to-work legislation. It has long been my position that it is up to the individual states to guarantee workers' freedom whether to join a union, and Congress should not take any action to curtail that freedom. The Supreme Court has further protected these rights.

I am confident that after examining my voting record and understanding the true course of events regarding this matter you will realize that I support each worker's right to work and to be free from subsidizing political activities against his will.

I greatly appreciate your sharing your concerns with me on this matter. If I can be of any assistance to you in the future, please do not hesitate to call on me.

Sincerely,

/s/ ROBIN TALLON
ROBIN TALLON
Member of Congress

RT:md

NANCY L. JOHNSON
6th District, Connecticut

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D.C. 20515

October 8, 1985

Bente Pedersen
Stage Coach Road
Durham, CT 06422

Dear Friend:

Thank you very much for your letter concerning a recent procedural vote regarding amendments to the Treasury, Postal Service and General Government Appropriations bill. After debate was completed on this measure, a routine motion to "rise" was offered and I, along with a majority of my colleagues, voted "yes" in order to bring the measure to a vote in the full House of Representatives. The effect of the vote was to prevent consideration of non-germane amendments on an appropriations bill.

Without delving into too much parliamentary detail, I cast my vote as I did in order to end debate on an important appropriations bill that had been thoroughly considered and was not, in my view, an appropriate vehicle for the consideration of the Federal Election Commission matter that you outlined. Furthermore, in light of the Supreme Court's clear decision in *Ellis et al.* vs. *Brotherhood of Railroad and Airline Clerks,* I believe it highly unlikely that the FEC will issue regulations in direct contravention of the high court's ruling. As you well know, unless Congress enacts a law that overturns or modifies a Supreme Court decision, that decision becomes the law of the land and must be followed by citizen and government agency alike.

I agree with the *Ellis* decision because I believe compulsory union dues may be used for political purposes only with permission from the union member paying those dues. Since the Supreme Court has ruled on this issue, I see no need to add another layer of federal legislation onto the Federal Election Commission.

I appreciate your taking the time to write on this issue and look forward to hearing from you again, as your thoughts and observations help guide my work in Congress.

Very truly yours,

/s/ NANCY L. JOHNSON
NANCY L. JOHNSON
Member of Congress

NLJ:srl

BOB KASTENMEIER
2d District, Wisconsin

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, DC 20515

September 9, 1986

Mr. E. W. Fobes
4349 Highway AB
Madison, Wisconsin 53704

Dear Mr. Fobes:

I have received your postal card regarding the Federal Elections Commission and an amendment offered by Congressman Cobey which would instruct the FEC to uphold certain Supreme Court rulings.

The amendment was not needed because we do not need legislation to prohibit unconstitutional actions. Such actions are already prohibited. Secondly, the adoption of the Cobey amendment would incorrectly imply that the FEC is operating in a manner which violates the Supreme Court decisions in certain cases. That is simply not the case.

Supporters of the Cobey amendment state that the U.S. Supreme Court, in certain cases, has declared the use of compulsory union dues for political purposes to be unconstitutional. They go on to say that, since the FEC allows compulsory union dues to be used for certain political purposes, the FEC is not complying with those decisions.

This is an inaccurate characterization of the Supreme Court's rulings. What the Court has consistently held is that a union may not use compulsory union dues for political purposes or other purposes unrelated to its collective bargaining duties against the objections of dissenting employees. Moreover, the Court has held that this dissent is not to be presumed but must be made known to the union by the dissenting employees.

Supporters of the Cobey amendment actually intend to go much further than the Supreme Court by preventing the political use of any compulsory dues, even if the union membership unanimously wants them to be used for political purposes.

The Supreme Court has been very stringent in this area. Once an employee has raised objections, the union must have adequate procedures to ensure that the employee's dues are reduced by the amount attributable to noncollective bargaining activities. The union cannot even collect the money in advance and then provide a rebate.

A large majority of the House disagreed with the Cobey amendment and voted to bring the debate to a close. There was no vote on the Cobey amendment.

Sincerely,

/s/ Bob Kastenmeier
Robert W. Kastenmeier
Member of Congress

RWK:s

W. G. (Bill) Hefner
8th District, North Carolina
CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, DC 20515

September 16, 1986

Mr. Howard H. Strickland
Route 2, Box 535
Rockwell, NC 28138

Dear Mr. Strickland:

Thank you for your response to my newsletter and your comments on a labor vote in the House which occurred on August 6. I wanted to take this opportunity to communicate with you on what took place.

The vote was on a procedural question to rise from the Committee of the Whole to report the Treasury-Postal Service Appropriations bill to the full House. Mr. Cobey had wanted to offer a legislative amendment to that bill to instruct the FEC to comply with recent Supreme Court rulings on the use of compulsory union dues for political purposes. The motion to rise was adopted and he was not able to offer his amendment under rules of the House.

I voted for the motion to rise for several reasons. First, I oppose the practice of proposing legislative language to appropriations bill and vote for such amendments only when it is absolutely necessary.

Second, I felt the amendment was unnecessary since we already have laws to prohibit unconstitutional actions. Third, the amendment would imply that the FEC is currently operating illegally, and this is not the case.

The Court held that compulsory union dues may not be used for political purposes against the objection of dissenting employees. The Court further held that this dissent

is not to be presumed but must be made known to the union by the dissenting employees.

The Cobey amendment would go much further than that and would, in effect, prevent political use of these dues even if the union membership unanimously supported that use for political purposes.

I believe this was an attempt to grab headlines and was billed as being a "key vote" in order to give certain groups an opportunity to solicit contributions for their coffers. I have always supported and will continue to support the right-to-work laws of our State, and I resent this attempt to mislead my constituents in this manner.

I thought you would be interested in seeing a copy of my response to the National Right to Work Committee's 1986 questionnaire.

With kindest regards, I am

Sincerely,

/s/ BILL
BILL HEFNER
Member of Congress

BH/ids
Enclosure

BILL RICHARDSON
3rd District, New Mexico

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, DC 20515

October 3, 1986

Mrs. Margaret Hardy
P.O. Box 231
Edgewood, NM 87015

Dear Mrs. Hardy:

Thank you for your recent letter expressing your views on H.R. 2534—the Compulsory Campaign Contribution Act. I always appreciate hearing the views of the people I represent in Congress.

I sympathize with your concerns on this issue. As you may know, no union, including the NEA, can make campaign contributions to federal candidates. It is against the law. However, under current law, unions are permitted—as are corporations—to use some of their money for certain political activities that don't involve direct contributions, such as nonpartisan voter registration drives.

While I am aware there are those who are displeased with political activities by the NEA, I'm sure your aware that union members who object to having a portion of their dues money used for political purposes of any kind are entitled to a rebate of that portion of their dues. Therefore, the only union money being spent for political activities is money paid willingly for that purpose.

I have some concerns about participation in the political process, but it troubles me that the bill, H.R. 2534, would prohibit nearly all political activities of unions while allowing those of corporations and trade associations to continue. Consequently, the bill would treat labor unions dif-

ferently from corporations and trade associations, even though they all are engaging in the same kinds of political activities. Personally, I am inclined to think that an even-handed policy is better. I contacted Congressman Dickenson, who sponsored H.R. 2534, to express my interest in this legislation. H.R. 2534 is currently in the Subcommittee on Elections with no action pending. Should this bill be considered by the full House, I will keep your views uppermost in my mind.

Again, thank you for sharing your views with me. If you have any other concerns, feel free to write me at any time.

With warm regards,

/s/ BILL
BILL RICHARDSON
Member of Congress

GERALD D. KLECZKA
4th District, Wisconsin
CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D.C. 20515

December 9, 1986

Mr. Irwin J. Kessler
112 Fairview Ave.
Waukesha, Wisconsin 53186

Dear Mr. Kessler:

Thank you for contacting me concerning the use of union dues for political purposes. I am afraid that a lot of incorrect information has been circulating on this issue. Please excuse the long delay in responding to your letter.

I share your desire that compulsory union dues not be used for political purposes. In fact, the Supreme Court has ruled that such practices are illegal, and this ruling is enforced by the Federal Election Commission (F.E.C).

Of course, union members may voluntarily contribute to unions' political action committees. Likewise, union dues may be spent to educate union members. But no union member is required to pay any dues that are used for other than collective bargaining purposes.

On August 6, 1986, I voted along with a majority of my colleagues against an amendment offered by Congressman Bill Cobey to the FEC Reauthorization Act which would have prevented the political use of union dues even if the union membership unanimously wanted them to be used for political purposes. I believe that union members, like any other Americans, should be free to make political contributions.

Thanks for writing.

Sincerely,

/s/ JERRY
GERALD D. KLECZKA
Member of Congress

GDK/wb

RICHARD H. LEHMAN
18th District California

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
Washington, D.C. 20515

December 22, 1986

Mr. Raymond C. Leite
21686 De Los Portale
Sonora, California 95370

Dear Mr. Leite:

Thank you for your letter concerning the Federal Election Commission (FEC) and the expenditure of union dues. You may be interested in knowing that as a matter of law unions are already prohibited from using mandatory dues for political purposes. Under our labor laws, mandatory dues may only be used for purposes of representing workers in collective bargaining. To ensure workers are protected, workers have a legal right to know up front exactly how the dues payments are to be used; they are entitled to deduct any share of the dues payment that is used for purposes other than collective bargaining; and they are entitled to a refund with interest of any share of a required dues payment that was used without the worker's knowledge for purposes other than covering the costs associated with collective bargaining representation along with an equivalent reduction of all future dues.

Since the law both prohibits the use of mandatory dues for political purposes and provides remedies where such violations occur, it makes no sense to amend the Federal Election Campaign Act to require the FEC to do what is already being done. The FEC is among the smallest agencies in the government with an annual budget of approximately $122 million. Its responsibilities are limited to regulating the manner in which labor unions, businesses, and others spend money for political purposes. To require

the FEC to also regulate how those funds are collected, as has been proposd by the National Right to Work Committee, would not only require the FEC to duplicate what is already being done by the Department of Labor, the Internal Revenue Service, the Federal Trade Commission, the Securities Exchange Commission, and a host of other federal agencies, but would add millions and maybe billions of dollars to the cost of operating the FEC.

Finally, the amendment proposed by the Right to Work Committee to the Federal Election Campaign Act was significantly flawed in two other repects. First, the amendment sought to amend that law as it relates to political contributions from one segment of society while making no corresponding amendments to the law as it affects political contributions from other segments of society. For example, this amendment seeks among other things to preclude unions from using dues to administer political action committees. Yet, everytime you buy a product, the company producing and/or selling that product is free to use the profits thereby derived in exactly the same manner.

In other words, whether you like it or not, every time you buy something you may be contributing to the expression of political views that you neither share nor support; yet there was nothing in the amendment to deal with such alleged abridgements of constitutional rights. While I am not advocating such an amendment to the Federal Election Campaign Act, I do feel strongly that we must ensure that law applies equally to all aspects of our society and does not act to discourage the fair and proper participation of anyone in the political process. I do not feel that the amendment that has been proposed by the Right to Work Committee meets this test.

Secondly, to the extent that the amendment sought to restrict the ability of unions to communicate freely with their members, the amendment, itself, represented an abridgement of rights guaranteed by the First Amendment.

Again, thank you for sharing with me your views on this subject.

Sincerely,

/s/ RICHARD LEHMAN
RICHARD H. LEHMAN
Member of Congress

RHL/cf

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No. 86-637

In the Supreme Court of the United States

OCTOBER TERM, 1987

COMMUNICATIONS WORKERS OF AMERICA and ITS LOCALS 2100, 2101, 2108 and 2110,
Petitioners,

vs.

HARRY E. BECK, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE LANDMARK LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

Amicus Landmark Legal Foundation* is a not-for-profit public interest law foundation committed to preserving the principles of limited government, free enterprise, federalism, separation of powers, strict construction of the United States Constitution and individual rights.

*Landmark Legal Foundation recently changed its name from Gulf and Great Plains Legal Foundation.

The Foundation, through original action litigation and amicus curiae briefs, has fervently supported the right of individuals to freely exercise their First Amendment beliefs to support or oppose the political philosophy of their choice. Moreover, the Foundation has strenuously opposed state and federal governmental restrictions on and hindrances to the free enterprise system and the economic rights of individuals.

Landmark, as Gulf and Great Plains, has appeared as amicus curiae before this Court in a number of cases involving a broad range of public interest issues. Landmark submits this brief to assist the Court in its deliberations on the significant personal and economic liberty questions presented by this case.

SUMMARY OF ARGUMENT

The terms of the National Labor Relations Act (NLRA) reflect the intent of Congress to preserve the right of workers to bargain collectively through a union bargaining agent. That is the central purpose of the NLRA. It follows that agency fees charged to nonunion workers by the Communications Workers of America, based on a union security arrangement authorized by the NLRA, may not be used by that union for activities beyond collective bargaining. The legislative history of the NLRA indicates that Section 8(a)(3) of that Act is to be applied in the same manner as Section 2, Eleventh of the Railway Labor Act (RLA). The RLA has consistently been interpreted by this Court to proscribe the use of agency fees for activities not related to collective bargaining. It is inconsistent with the will of Congress to interpret the NLRA differently than the RLA. Under

the NLRA, the Communications Workers of America may not collect union dues from nonunion workers, based on a union security arrangement, for purposes other than collective bargaining.

The First Amendment rights to free speech and association limit governmental authority to prohibit or compel an individual's participation in or support of a particular political ideology. A labor union which, pursuant to a federal statute, compels nonunion workers to financially support its political activities unconstitutionally burdens the free speech rights of those nonunion workers.

This compulsion thrust upon nonunion workers constitutes governmental action. In effect, the NLRA serves as the source of the power, wielded by unions, to compel financial support of a political ideology through the union security arrangement. Such arrangements are clearly a boon to labor unions, and the statutory authorization of such arrangements, as in Section 8(a)(3) of the NLRA, would undoubtedly act as a powerful incentive for unions to utilize them. The federal statute is the source of power giving rise to the infringement of free speech rights, and it would encourage private actors, labor unions, to carry out the constitutional infringement. Governmental action, then, would be present if the Communications Workers of America were allowed to compel nonunion employees to support its political activities through a union shop agreement. The union would be using a federal statute, the NLRA, as a predicate for violating the First Amendment rights of nonunion workers.

Employees in the communications industry who exercise their right of free choice and opt not to join the

Communications Workers of America may not constitutionally be forced to subsidize, with compulsory agency fees, the political ideology of that labor union under a collective bargaining agreement made pursuant to the NLRA. To require a nonunion worker to subsidize the political activities of the Communications Workers of America, under threat of dismissal from employment, would constitute an egregious infringement on those workers' First Amendment right to free speech and association.

ARGUMENT

I.

THE FOURTH CIRCUIT COURT OF APPEALS CORRECTLY INTERPRETED THE NATIONAL LABOR RELATIONS ACT TO PROHIBIT, BY ITS TERMS, THE COMMUNICATIONS WORKERS OF AMERICA FROM REQUIRING NONUNION EMPLOYEES, AS A CONDITION OF EMPLOYMENT, TO FINANCE IN PART UNION ACTIVITIES UNRELATED TO COLLECTIVE BARGAINING.

On its face the National Labor Relations Act (NLRA) proscribes the use of agency fees contributed by nonunion workers for any purpose other than collective bargaining. The NLRA provides that the policy of the Act is aimed at protecting the right to collective bargaining. 29 U.S.C. §151. The Act defines a "labor organization" as an entity that exists to deal with employers concerning grievances, disputes, pay, hours and conditions, all of which fall within the realm of collective bargaining. 29 U.S.C. §152(5). Moreover, the NLRA provides that union

bargaining representatives are "for the purposes of collective bargaining." 29 U.S.C. §159(a). The clear intent of Congress, from the explicit terms of the NLRA, was to allow employees to choose a collective bargaining agent. The central theme of the statute is collective bargaining.

The union security arrangement is sanctioned by Section 8(a)(3) of the NLRA. Given the intent of Congress to protect the right of employees to bargain collectively under the NLRA, it stretches logic and good sense to argue that Section 8(a)(3) allows agency fees of nonunion employees to be expended for any purpose beyond collective bargaining. Under the NLRA, the role of the labor union is to be played out at the bargaining table. Compelling nonunion employees to subsidize any union activities unrelated to collective bargaining contravenes not only the spirit and purpose of the NLRA, but also its express terms.

Section 8(a)(3) allows a union security agreement under which employment may be conditioned upon union membership. This Court has held, however, that membership "has been whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). As a result, nonunion employees cannot, under the NLRA, be forced to pay for any more than their share of collective bargaining expenses. Their membership obligations extend no further than the requirement that they reimburse the union agent for costs incurred in that capacity. The Court of Appeals in this case was correct when it concluded that Section 8(a)(3) had been violated by a union engaging in the exaction of union dues from non-consenting nonunion employees under an agency

contract beyond the requirements for purposes of collective bargaining, grievance adjustment or contract administration. . . ." *Beck v. Communications Workers of America*, 800 F.2d 1280, 1281 (4th Cir. 1986) (en banc).[1]

The Railway Labor Act (RLA) governs labor relations involving railway and airline workers. Section 2, Eleventh of the RLA allows union security agreements to be contained in collective bargaining contracts which are subject to the RLA. 45 U.S.C. §152, Eleventh. The Act was amended in 1950 to add the provision authorizing the union security arrangement. The terms of the amended RLA are "substantially the same as those of the [NLRA] as they have been administered." S. Rep. No. 2262, 81st Cong., 2d Sess. 3 (1950).

Thus, the legislative history of the RLA indicates that the 1950 amendments were intended to afford railroad and airline employees the same collective bargaining rights as workers in other industries, including those industries whose labor relations are governed by the NLRA. Three Senators reserved the right to amend the RLA security agreement provisions so that application of the RLA would be in "general accord [with the union security] conditions of employees of other industry."[2] *Id.* at 4. Congress clearly intended the parallel provisions

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1. The Fourth Circuit also found this unlawful exaction of union dues constituted a breach of the union's duty of fair representation. This duty is defined as an obligation of the union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

2. The three Senators included Senator Taft. In 1947 he had sponsored and co-authored the Taft-Hartley Act. This legislation authorized the union shop arrangement in collective bargaining contracts subject to the NLRA.

of the RLA and NLRA to be applied in the same fashion. Consequently, Section 2, Eleventh of the RLA and Section 8(a)(3) of the NLRA are virtually identical in purpose and effect.

This Court has repeatedly held that the RLA restricts union expenditure of agency fees to the costs of collective bargaining. *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984). These cases represent a consistent interpretation of the RLA to proscribe the use of agency fees paid by nonunion workers to promote the political ideology of the union. In *Street*, the Court observed: "One looks in vain for any suggestion that Congress also meant in §2, Eleventh to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose." 367 U.S. at 764. The net effect of *Street*, and its progeny, is to proscribe the use of agency shop fees for political activities over the objections of employees.[3]

Section 8(a)(3) of the NLRA requires the same construction as that given Section 2, Eleventh of the RLA in the *Street* line of decisions. The legislative history of the RLA clearly indicates that it was to be "substantially the same" in application as the NLRA. For this Court to be faithful to the intent of Congress, the NLRA must be interpreted to restrict the use of agency fees to union activities related to collective bargaining, and, consequently, to prohibit the use of agency fees for political activities.

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3. *See* Cantor, *Uses and Abuses of the Agency Shop*, 59 Notre Dame L. Rev. 61, 65-76 (1983).

II.

COMPULSORY AGENCY FEES CHARGED TO NONUNION EMPLOYEES BY THE COMMUNICATIONS WORKERS OF AMERICA, PURSUANT TO A UNION SECURITY ARRANGEMENT AUTHORIZED BY SECTION 8(a)(3) OF THE NATIONAL LABOR RELATIONS ACT, MAY NOT CONSTITUTIONALLY BE USED BY THE UNION REPRESENTATIVE FOR THE PROMOTION OF POLITICAL AND IDEOLOGICAL CAUSES.

Under a union security arrangement, labor unions are allowed to require nonunion employees to pay the equivalent of union dues to the union in return for the benefits derived from having a bargaining representative. Both the NLRA and the First Amendment permit this compulsion as a solution to the "free-rider problem." Beyond collective bargaining, however, there is no compelling governmental interest, such as the "free-rider problem," in impinging nonunion workers' First Amendment rights to free speech and association. Therefore, any compulsion of nonunion employees to financially support union activities which are not related to collective bargaining constitutes an abridgement of those workers' First Amendment rights.

A. The Exaction Of Agency Fees From Nonunion Employees By The Communications Workers Of America Under A Union Security Arrangement Constitutes Governmental Action.

The union bargaining agent derives the authority to compel the payment of union dues or agency fees from the National Labor Relations Act. This compulsion constitutes governmental action in that "the federal statute

is the source of the power and authority by which any private rights are lost or sacrificed." *Railway Employee's Dept. v. Hanson*, 351 U.S. 225, 232 (1956). The Act represents the implementation of a congressionally designed labor policy. *Havas v. Communications Workers of America*, 509 F. Supp. 144, 148 (N.D.N.Y. 1981). As such, the Act serves to encourage labor unions to enter into union shop agreements pursuant to Section 8(a)(3) of the NLRA.

The union shop arrangement is clearly advantageous to the labor union. It not only allows the union to act as the exclusive bargaining representative, but forces employees to join the union, or at least pay agency fees, under the threat of dismissal. This type of agreement allows the representative union to collect financial support from all affected employees, including those who choose not to join the union. The union security arrangement, therefore, greatly strengthens a particular union at the local level and the labor movement in general. Given Section 8(a)(3)'s authorization, labor unions will enter into union shop agreements whenever possible because such agreements make unions more powerful through self-perpetuation. It is unrealistic to contend that the federal government, through the NLRA, does not encourage union shop arrangements—and compelled payment of agency fees—within collective bargaining agreements.

Moreover, the use of agency fees by a labor union for purposes other than collective bargaining is a judicially cognizable activity on constitutional grounds because a federal statute, the NLRA, encourages the activity which gives rise to the constitutional infringement. *See Reitman v. Mulkey*, 387 U.S. 369, 375, 380-81 (1967); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Without question,

"[g]overnmental action is infused in the NLRA." *Havas*, 509 F. Supp. at 148. *See Linscott v. Miller Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971); *Lykins v. Aluminum Workers*, 510 F. Supp. 21 (E.D. Pa. 1980). *But see Price v. International Union*, 795 F.2d 1128 (2d Cir. 1986); *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983). Concerning Section 2, Eleventh of the RLA, which has the same purpose and effect as Section 8(a)(3) of the NLRA, this Court has concluded that "the enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal action." *Hanson*, 351 U.S. at 232.

The Court recognized in *Hanson* that although the union shop or agency shop agreement is between private parties, the federal government is the source of authority by which unions may infringe upon the First Amendment rights of workers through the union security arrangement. The First Amendment prevents labor unions from using the NLRA as a club with which to bludgeon the free speech rights of employees.[4]

B. The Use Of Agency Fees Paid By Nonunion Employees To Support Union Political Activities Unrelated To Collective Bargaining Is Tantamount To Compelled Subsidization Of The Union's Political Ideology.

The First Amendment protects the individual citizen's right to free speech and association. The government may

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4. The existence of the requisite governmental action can also be maintained based on the union's position as the exclusive bargaining agent. "The representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations." *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 198 (1944). *See J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

not prevent a person from associating with a particular group or force an individual to join a particular group. A member of this Court recently noted that "the right to be free from compelled associations is found in our conviction that individuals may not be forced to join or support positions or views which they find objectionable on moral, ideological, or personal grounds." *Minnesota State Bd. For Community Colleges v. Knight*, 465 U.S. 271, 297 (1984) (Brennan, J., dissenting).

If, under a union security agreement pursuant to provisions in the NLRA, a labor union is allowed to expend agency fees collected from nonunion workers for union activities other than collective bargaining, then the First Amendment rights of those nonunion workers are in jeopardy. Labor unions spend enormous sums of money to promote their political ideology. The CWA claims that it has the right to spend its funds, including the agency fees of nonunion workers, on any activity it wishes, even those promoting its political ideology. Petitioners have argued that the NLRA authorizes labor unions to compel nonunion workers to subsidize union political causes. This compelled subsidization is proscribed by the First Amendment.

This Court has previously held that public employees may not constitutionally be compelled to subsidize the political ideology of their union representative under the guise of an agency shop arrangement. *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977). This Court has also held that, under the RLA, railway workers may not constitutionally be compelled to subsidize the political ideology of their union representative based on a union security arrangement. *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984). *See International Ass'n of*

Machinists v. Street, 367 U.S. at 768 (the authority to impose dues and fees restricted to the "extent of denying the union the right, over the employee's objection, to use his money to support political causes which he opposes").

The same First Amendment protections against compelled subsidization of a political ideology must be afforded to workers whose labor relations are governed by the NLRA. Like public employees, communications workers should not be coerced into financially supporting political activities with which they disagree under the threat of losing employment. *See Abood,* 431 U.S. at 236. Like unions in the railroad industry, the CWA must spend funds collected through an agency shop agreement only on "activities germane to collective bargaining." *See Railway Clerks v. Allen,* 373 U.S. 113, 122 (1963). Any government-sanctioned compulsion beyond that constitutes a violation of nonunion workers' rights to free speech and association in that they would be "captive to ideas, associations and causes espoused by others." *Seay v. McDonnell Douglas Corp.,* 427 F.2d 996, 1004 (9th Cir. 1970).[5]

Compelled subsidization of a political ideology is a clear violation of the First Amendment, a violation which goes to the very heart of this constitutional safeguard. Thomas Jefferson once wrote that to compel an individual "to furnish contributions of money for the propagation of opinions with which he disbelieves . . . is sinful and tyrannical." It is also unconstitutional. One group may not, with the authorization of a federal statute, coerce another

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5. The infringement cuts two ways. Not only is the nonunion worker made captive to the ideology of the labor union, but the portion of his paycheck which is taken by the union reduces the worker's ability to financially promote political causes which he does support. *Seay,* 427 F.2d at 1004.

group into financing its political beliefs and convictions. Unions may not, therefore, constitutionally use agency fees for political activities over the objections of nonunion employees.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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